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**Supreme Court of the United States**

**OCTOBER TERM, 1939**

**No. 240**

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**FRANK CARMINE NARDONE, NATHAN W. HOFF-  
MAN AND ROBERT GOTTFRIED, PETITIONERS,**

**vs.**

**THE UNITED STATES OF AMERICA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT**

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**PETITION FOR CERTIORARI FILED JULY 28, 1939.**

**CERTIORARI GRANTED OCTOBER 9, 1939.**

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# United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA

against

FRANK CARMINE NARDONE, NATHAN W.  
HOFFMAN, ROBERT GOTTFRIED,  
Defendants-Appellants.

## Statement.

This is a criminal cause begun in the United States District Court for the Southern District of New York by the filing of an indictment on July 7, 1938, by the United States of America against Frank Carmine Nardone, alias Frank Carmine, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Nat, Austin L. Callahan, Hugh Brown and Robert Gottfried, alias Robert Godfrey, alias Robbie. The defendant, Erickson, pleaded guilty. The other defendants pleaded not guilty and were released on bail. The trial of this case began on March 10, 1939, before Honorable John W. Clancy and was concluded on March 23, 1939.

The jury found all the defendants guilty. The defendant, Frank Carmine Nardone, was sentenced to two years on counts 1-2-3 to run concurrently with each other at a penitentiary to be designated by the Attorney General and fined \$3000 on count three.

The defendant, Robert Gottfried, was sentenced to one year and one day on each counts 1-2-3 to run concurrently with each other at a penitentiary to be designated by the Attorney-General.

*Statement.*

4 The defendant, Hugh Brown, was sentenced to three months on each of counts 1-2-3 to run concurrently with each other at Detention Headquarters, New York City, but was given a suspended sentence and placed on probation for three months. The defendant, Nathan W. Hoffman, was sentenced to two years on each of counts 1-2-3 to run concurrently with each other at a penitentiary to be designated by the Attorney General and fined \$2500.00 on count 3. The defendant, Austin L. Callahan, was sentenced to one year and one day on each of counts 1-2-3 to run concurrently. Sentence was suspended and he was placed on probation for three years. Sentence as to the defendant Bert Erickson  
5 was deferred.

6

## Docket Entries.

24

## CRIMINAL COURT

7

THE UNITED STATES

vs.

FRANK CARMINE NARDONE alias FRANK  
CARMINE; BURT or BERT ERICKSON alias  
THE SWEDE alias HARRY ROSEN, alias  
HENRY BISHOP, alias MARSHAND;  
NATHAN HOFFMAN alias NAT; AUSTIN  
L. CALLAHAN; HUGH BROWN; ROBERT  
GOTTFRIED. alias ROBERT GODFREY, alias  
ROBBIE.

8

Title 18 Sec. 88 U. S. Code

Unlawfully smuggling and clandestine introduction  
into the U. S. without making entry at U. S. Custom  
House certain merchandise etc. contrary to law.

Mar. 27, 1939—Deposit. Received 5

Mar. 31, 1939—Fees earned. Disbursed 5

July 7, 1938—Filed Indictment.

9

July 11, 1938—Burt Erickson Bench warrant ordered.

Nathan W. Hoffman Bench warrant ordered.

Frank C. Nardone pleads not guilty, bail \$2000.— to be  
rewritten to cover this indictment & C 98-300.

Austin L. Callahan pleads not guilty, bail \$2000.— to be  
rewritten to cover this indictment & C 98/300—

Hugh Brown pleads not guilty, bail \$500 to be rewritten  
to cover this indictment & C 98/300.

Robert Gottfried pleads not guilty. Bail \$1000 to be  
rewritten to cover this indictment & C 98/300.

Above paroled to give Bail— Knox, J.



*Docket Entries.*

- 10 July 11, 1938—Filed Recognizance—Frank C. Nardone—\$2000.— National Surety Corp. (This bond to cover C 98-300 and this indictment.)
- July 11, 1938—Filed Recognizance—Hugh Brown—500.— National Surety Co. (This bond to cover this indictment & C 98-300.)
- July 11, 1938—Filed Recognizance—Robert Gottfried—\$1000.— National Surety Co. (This bond to cover this indictment & C 98-300.)
- 11 July 20, 1938—Filed Bench Warrant as to Burt Erickson & Nathan W. Hofman & marshal's return "unable to find debts" 7/19/38.
- Sept. 14, 1938—Filed Notice of motion for an order granting an inspection of the Grand Jury minutes as to Frank Carmine Nardone Memo End. Motion Denied (see memo of this date). Hulbert, J.
- Sept. 14, 1938—Filed notice of motion for an order for bill of particulars; Memo End. Motion Denied (see memo. of this date): Hulbert, J.
- Sept. 14, 1938—Filed affidavit of Maxwell S. McKnight.
- 12 Sept. 14, 1938—Filed memorandum #11677. Hulbert, J.
- Nov. 14, 1938—Filed Order denying motions of def't Frank Carmine Nardone for an order to inspect grand jury minutes and for an order dismissing the indictment. Hulbert, J.
- Nov. 7, 1938—Filed Notice of Motion for an order to quash Indictment and dismissing Indictment. Memo. Endorsed. Motion Denied. Bondy, J.  
(This paper erroneously marked C 98-300 & entered under that number.)

*Docket Entries.*

- Dec. 15, 1938—Filed Order on motion with Notice of Settlement, Motion to dismiss Indictment as to F. C. Nardone denied. Bondy, J. 13
- Dec. 20, 1938—Filed Order, with notice of settlement, denying motion of Frank Carmine Nardone for bill of particulars. Hulbert, J.
- Feb. 6, 1939—Nathan W. Hoffman—Pleads not Guilty. Bail \$2500. Paroled in Custody of his Atty. to give bail. Patterson, J.
- Feb. 6, 1939—Filed Notice of Appearance by Wegman & Climenko, Atty for deft. Nathan W. Hoffman. 14
- Feb. 14, 1939—Bert Erickson surrendered to this Court. Bail \$5000 furnished in Eastern District of New York to be re-written to cover this indictment. Paroled to give bail. Knox, J.
- Feb. 17, 1939—Burt or Bert Erickson. Bail reduced to \$2500. on motion of Asst. U. S. Atty McKnight. Knox, J.
- Mar. 2, 1939—Recognizance Austin L. Callahan \$2,000 National Surety Corp.
- Mar. 6, 1939—Filed notice of motion for bill of particulars as to Frank Carmine Nardone. Memo Endorsed. Motion Denied. Clancy, J. 15
- Mar. 6, 1939—Filed affidavit of Maxwell S. McKnight.
- Mar. 7, 1939—Affidavit for Writ of Habeas Corpus Ad Testificandum to produce John McAdams. Issued Writ Returnable forthwith.
- Mar. 10, 1939—Bert Erickson—Pleads guilty to Count 3. Counts 1 and 2 dismissed on motion of Mr. Dunigan. Asst. U. S. Atty. Sentence adjd. until after trial of remaining defendants—Bail continued. Deft. to remain in court during trial.

*Docket Entries.*

16 Mar. 10, 1939—Trial begun as to defendants Frank Carmine Nardone —Austin L. Callahan —Robert Gottfried — Hugh Brown and Nathan W. Hoffman. \* Clancy, J.

Mar. 10, 1939—Motion to dismiss indictment—Denied—Exception to all defts.

Mar. 13, 1939—Trial continued.

Mar. 14, 1939—Trial continued. Clancy, J.

Mar. 15, 1939—Trial continued. Clancy, J.

Mar. 16, 1939—Trial continued. Clancy, J.

17 Mar. 17, 1939—Trial continued. Clancy, J.

Mar. 20, 1939—Trial continued. Defendants motion for a mistrial. Motion Denied. Exception. Clancy, J.

Mar. 21, 1939—Trial continued. Defendants motion for a mistrial. Denied. Exception. Government Rests. Clancy, J.

Mar. 22, 1939—Government Rests. Trial continued. Defendants move to strike from the record all testimony obtained on the ground that it was obtained in violation of the Supreme Court ruling in the Nardone Case. Defendants move to dismiss the indictment on all counts as to all Defendants. All motions to dismiss. Denied. Exceptions. All defendants rest. Defendants renew all motions made at the close of the Government's case. All motions. Denied. Exceptions. Summations made on behalf of defts, Brown—Callahan—Gottfried and Hoffman. Clancy, J.

18 Mar. 23, 1939—Trial continued. Summations made by Mr. Cahill, attorney for deft, F. C. Nardone and by Mr. Dunigan, Ass't. U. S. Atty for the Government. Clancy, J.

*Docket Entries.*

Mar. 23, 1939—Alternate Jurors #13 and #14, Ordered 19  
 discharged from further deliberation of this case. Charge  
 by the Court made at 3:05 P.M.—Officer sworn. Jury  
 retires at 3:40 P.M. Jury returned at 5:05 P.M. with  
 the following verdict: Guilty on all counts as to all  
 defendants on trial to wit. Frank Carmine Nardone—  
 Austin L. Callahan—Robert Gottfried—Hugh Brown  
 and Nathan W. Hoffman. Bail continued as to deft.  
 Bert Erickson. All motions re: verdict, etc., and the  
 sentence of the defendants adjourned to March 24th,  
 1939 at 2:00 P.M. Motions to set aside verdict as to  
 deft. Hugh Brown. Denied. Exception. Defendants  
 Nardone, Callahan, Gottfried, Brown, Hoffman. Re- 20  
 manded. Clancy, J.

Mar. 24, 1939—Motion for arrest of judgment and to set  
 aside the verdict as to each defendant. Denied. Excep-  
 tion. Clancy, J.

Mar. 24, 1939—Bert Erickson—Sentence adj'd to 4/7/39.  
 Bail Continued. Clancy, J.

Mar. 24, 1939—Bail as to Austin L. Callahan on C 98/300  
 and C 103/24 discharged.

Mar. 24, 1939—Motion for bail pending appeal as to de-  
 fendants; Nardone, Hoffman, Callahan and Gottfried. 21  
 Denied. Exception. Clancy, J.

Mar. 24, 1939—Filed Judgment (#38965) Frank Carmine  
 Nardone—Sentenced:—Two Years on counts 1-2-3 to  
 run concurrently with each other at a penitentiary to  
 be designated by the Attorney-General and fined \$3000.  
 on count 3. Deft to stand committed until such fine  
 on count 3 shall be paid or until he shall be otherwise  
 discharged by due course of law. Clancy, J.

Mar. 24, 1939—Issued commitment and copies as to Frank  
 Carmine Nardone.

*Docket Entries.*

22 Mar. 24, 1939—Filed Judgment. Robert Gottfried. Sentenced to: One Year and One Day on each of counts 1-2-3 to run concurrently with each other at a penitentiary to be designated by the Attorney-General. Clancy, J.

Mar. 24, 1939—Issued commitment and copies as to Robert Gottfried.

Mar. 24, 1939—Filed Judgment. Hugh Brown. Sentenced to: Three Months on each of counts 1-2-3 to run concurrently with each other at Detention Hdqts. N. Y. C. Execution of sentence suspended. Probation for Three Months, subject to the standing probation order of this Court. Clancy, J.

23

Mar. 24, 1939—Filed Judgment (#38964) Nathan W. Hoffman. Sentenced. Two Years on each of counts 1-2-3 to run concurrently with each other at a penitentiary to be designated by the Attorney-General and fined \$2500.00 on count 3. Deft to stand committed until such fine on count 3 shall be paid or until he shall be otherwise discharged by due course of law. Bail discharged. Clancy, J.

24

Mar. 24, 1939—Issued commitment and copies as to Nathan W. Hoffman.

Mar. 24, 1939—Filed Judgment Austin L. Callahan sentenced to One Year and One Day on counts 1-2-3 to run concurrently with each other in a penitentiary designated by the Atty General. Clancy, J.

Mar. 25, 1939—Filed Amended Judgment. Austin L. Callahan sentenced to One Year & One Day on each of Counts 1-2-3 to run concurrently and suspended. Probation for Three Years, subject to the standing Probation Order of this Court. Clancy, J.



*Docket Entries.*

Mar. 27, 1939—Filed Notice of Appearance. David N. Cahill Atty for Frank C. Nardone. 25

Mar. 27, 1939—Filed Notice of Appeal as to Nathan Hoffman, Robert Gottfried & Frank C. Nardone.

Mar. 27, 1939—Filed assignment of errors.

Mar. 28, 1939—Filed discharge as to Hugh Brown—dated 3/27/39. Clancy, J.

Mar. 28, 1939—Filed Remand as to Frank Carmine Nardone, N. W. Hoffman, A. L. Callahan, H. Brown & R. Gottfried dated 3/23/39. Clancy, J.

Mar. 30, 1939—Filed Affidavit & Order for Writ of Habeas Corpus ad testificandum to make discovery on oath concerning the property of Frank C. Nardone. Hulbert, J. Issued Writ returnable April 5, 1939. 26

Mar. 30, 1939—Filed affidavit & Order for Writ of Habeas Corpus ad testificandum to produce Nathan W. Hoffman to examine on oath concerning his property. Hulbert, J. Issued Writ returnable April 5, 1939.

Apr. 7, 1939—Filed Commitment & entered return. Defendant R. Gottfried delivered to the Detention Hdqts. NYC. 3/24/39.

Apr. 22, 1939—Filed order that the time to serve & file record on appeal, bill of exceptions, assignment of errors & the term of this Court is extended to and including the 10th day of July, 1939, as to defts. Frank C. Nardone, Nathan W. Hoffman, Austin L. Callahan, Hugh Brown & Robt. Gottfried. Clancy, J. 27

May 4, 1939—Issued execution, #38965 vs. Nardone for \$3000.

May 31, 1939—Bert Erickson. Bail reduced to \$1000. on motion of U. S. Atty. Knox, J.

**Indictment.**

28 **IN THE DISTRICT COURT OF THE UNITED STATES**  
**FOR THE SOUTHERN DISTRICT OF NEW YORK.**

Southern District of New York, ss: The grand jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York and inquiring for that district upon their oaths present:

29 There heretofore, to wit, on or about the 17th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Frank Carmine Nardone, alias Frank Carmine, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marchand, Nathan W. Hoffman, alias Nat, Austin L. Callahan, Hugh Brown and Robert Gottfried, alias Robert Godfrey, alias Robbie, the defendants herein, did unlawfully, wilfully and knowingly and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, without making dutiable consumption entry thereof, at the United States Custom House and Port of Entry with the United States Collector of Customs at the Port of New York, and without paying the duty thereon, certain merchandise, to wit, approximately 30 9,600 gallons of alcohol, which merchandise was subject to duty and should have been invoiced and for which merchandise, dutiable consumption entry should have been made at the United States Customs House and Port of Entry with the United States Collector of Customs at the Port of New York, and that the said defendants then and there well knew that dutiable consumption entry for the said merchandise had not been made at the United States Customs House and Port of Entry with the United States Collector of Customs at the Port of New York and that no invoice for the said merchandise was filed with the Col-

*Indictment.*

lector of Customs at the Port of New York, and that the 31  
 duty thereon was not paid as required by law; against the  
 peace of the United States and their dignity and contrary  
 to the form of the statute of the United States in such case  
 made and provided (U. S. C. Title 19, Section 1593a;  
 U. S. C. Title 18, Sec. 550).

## SECOND COUNT

And the grand jurors aforesaid, on their oath aforesaid,  
 do further present that heretofore, to wit, on or about the  
 17th-day of March, 1936, at the Southern District of New  
 York and within the jurisdiction of this Court, Frank Car- 32  
 mine Nardone, alias Frank Carmine, Burt or Bert Erick-  
 son, alias the Swede, alias Harry Rosen, alias Henry Bishop,  
 alias Marchand, Nathan W. Hoffman, alias Nat, Austin L.  
 Callahan, Hugh Brown and Robert Gottfried, alias Robert  
 Godfrey, alias Robbie, the defendants herein, did unlaw-  
 fully, wilfully, knowingly and fraudulently receive and con-  
 ceal and facilitate the transportation and concealment of  
 certain merchandise which had been imported and brought  
 into the United States contrary to law, and which the de-  
 fendants then and there well knew had been imported and  
 brought into the United States contrary to law, in that the  
 said merchandise had not been invoiced and entered at the 33  
 United States Custom House and Port of Entry with the  
 United States Collector of Customs at the Port of New  
 York, and in that the duty on the said merchandise as re-  
 quired by the Tariff Act of 1930 had not been paid, which  
 said merchandise consisted of approximately 9,600 gallons  
 of alcohol and for which said merchandise dutiable con-  
 sumption entry should have been made at the United States  
 Custom House and Port of Entry with the United States  
 Collector of Customs at the Port of New York, and for  
 which said merchandise an invoice should have been filed  
 with the United States Collector of Customs at the Port

*Indictment.*

34 of New York and on which merchandise duty should have been paid, as required by law, all of which the defendants then and there well knew; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (U. S. C. Title 19, Sec. 1593b; U. S. C. Title 18, Sec. 550.)

## THIRD COUNT

And the Grand Jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit, beginning on or about the 2nd day of January, 1935, and continuing up to and including the 14th day of May, 1936, at the Southern District of New York and within the jurisdiction of this Court, at the Eastern District of New York, the District of New Jersey, Halifax and Yarmouth, Nova Scotia, Montreal, Canada, St. Pierre, Miquelon, Georgetown and Charleston, South Carolina, Newport News, Virginia, St. George, Bermuda, New London, Connecticut, and on the high seas, Frank Carmine Nardone, alias "Frank Carmine", Burt or Bert Erickson, alias "The Swede", alias "Harry Rosen", alias "Henry Bishop", alias "Marshand", Nathan W. Hoffman, alias "Nat", Austin L. Callahan, Hugh Brown and Robert Gottfried, alias "Robert Godfrey", alias "Robbie",  
 35 the defendants herein, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with Pierre Leveque, alias "Durant", alias "Durand", alias "George Woodrow", William Kleb, Jr., alias "Walter Adams", Adrian Van Austin, Harold Conrad, Harry Ducos, James Bellman, John Saunders, alias "Red", alias "Big Red", George H. Geiger, alias "Jiggs", Lawrence Sweeney and Jack Baker, not named as defendants herein, and with divers other persons to the Grand Jurors unknown, to commit offenses against the United States, to wit, to violate the provisions of the Tariff Act  
 36



*Indictment.*

of 1930, more specifically, Title 19, United States Code, Sections 1593(a) and 1593(b), and the provisions of the Act commonly known as the Anti-Smuggling Act, approved August 5, 1935, in the following manner, that is to say: 37

It was the plan and purpose of said conspiracy that the said defendants and the other conspirators would unlawfully, wilfully and knowingly, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, certain merchandise, to wit, alcohol and other distilled spirits, which said merchandise was then and there subject to duty, without invoicing the same, and without paying the duty thereon as required by law. 38

It was a part of said conspiracy that the said defendants and the other conspirators, and divers other persons to the Grand Jurors unknown, in order to introduce into the United States alcohol and other distilled spirits contrary to law, would own, control and operate, and cause to be controlled and operated, certain vessels and boats, to wit, the British Oil Screw "Isabel H", the "Pronto", and the steamship "Southern Sword", and further, would maintain and operate radio stations in New York City, and other places to the Grand Jurors unknown, and would, from said radio stations, transmit to and receive from the vessels "Isabel H" and "Pronto" radio messages, all of which said radio messages would pertain and relate to the control, operation and movements of the aforesaid vessels and boats mentioned in this Count of this indictment. 39

It was further a part of said conspiracy that the said defendants, and the other conspirators, and divers other persons to the Grand Jurors unknown, would, during the period of time mentioned in this Count of this Indictment, by mail, telegraph, messenger, and otherwise transmit from New York City, New York, to Halifax and Yarmouth, Nova Scotia, and other places to the Grand Jurors unknown, large sums of money, the exact amounts being to the Grand Jurors



*Indictment.*

40 unknown, which said monies would be used in the purchase of alcohol and other distilled spirits in foreign countries for the purpose of facilitating its introduction into the United States contrary to law.

It was further a part of said conspiracy that the said defendants, and the other conspirators, would, at various times between the 2nd day of January, 1935, and the 20th day of March, 1936, congregate and meet together at the Hotel Astor, the Normandie Restaurant, and the Belfort Restaurant, located at Broadway and 44th Street, 307 West 46th Street, and 324 West 46th Street, New York City, respectively, and at other places to the Grand Jurors unknown, and would at such times and places, discuss, plan, arrange and agree upon ways, means, and manners and methods by which alcohol and other distilled spirits would be smuggled and introduced into the United States contrary to law, and would further at such times and places receive and make telephone calls from and to each other, and from and to other persons to the Grand Jurors unknown, all of which said telephone calls, or some of them, would pertain and relate to the smuggling of alcohol and other distilled spirits into the United States contrary to law.

42 It was further a part of said conspiracy that the said defendants and the other conspirators would cause the British Oil Screw "Isabel H" to proceed from a place to the Grand Jurors unknown, to a point on the high seas approximately 100 miles southeast of St. Pierre, Miquelon, and there meet a vessel known as the "Reidun", and receive from the said "Reidun" on several occasions, cargoes of alcohol and other distilled spirits, after which they would cause the "Isabel H" to proceed to St. Pierre, Miquelon, Halifax and Yarmouth, Nova Scotia, and to other points outside the territorial jurisdiction of the United States, to the Grand Jurors unknown.

It was further a part of said conspiracy that the said defendants and the other conspirators would cause the

*Indictment.*

vessel known as the "Pronto" to meet the British Oil Screw "Isabel H" on the high seas and at other points outside the territorial jurisdiction of the United States, and would trans-ship from the "Isabel H" to the "Pronto" at such times and places, cargoes of alcohol and other distilled spirits, and would then cause the said vessel "Pronto" to land and attempt to land at Keansburg, New Jersey, and at other places within the territorial jurisdiction of the United States, to the Grand Jurors unknown, the cargoes of alcohol so received and trans-shipped from the afore-said British Oil Screw "Isabel H". 43

It was further a part of said conspiracy that the said defendants and the other conspirators, and divers other persons to the Grand Jurors unknown, would cause to be placed aboard the British Oil Screw "Isabel H" at St. Pierre, Miquelon, a cargo of alcohol, to wit, approximately 2400 cases or approximately 14,400 gallons thereof, and would then cause the British Oil Screw "Isabel H" and the "Pronto" to proceed on the high seas to a point off the coast of North and South Carolina, at which place they would cause to be trans-shipped from the "Isabel H" to the "Pronto" approximately 800 cases of alcohol and other distilled spirits, after which they would cause the "Pronto" to land or attempt to land its cargo on the coast of South Carolina. 44

It was further a part of said conspiracy that the said defendants and the other conspirators would cause the British Oil Screw "Isabel H" to proceed from a point off the coast of North and South Carolina, to St. George, Bermuda, and would, at New York City, New York; Wildwood, New Jersey; Montauk, Long Island; and other places to the Grand Jurors unknown, attempt to obtain and arrange, and obtain and arrange, for a vessel or boat to receive the remaining cargo of alcohol aboard the "Isabel H". 45

It was further a part of said conspiracy that the said defendants, and the other conspirators, would, at New York

*Indictment.*

- 46 City, New York, and Newport News, Virginia, arrange for the Steamship "Southern Sword" to proceed from Newport News, Virginia, to a point approximately six miles east of Winter Quarter Lightship, at which place the Steamship "Southern Sword" would meet the British Oil Screw "Isabel H", and would receive from the British Oil Screw "Isabel H", approximately 1600 cases of alcohol and other distilled spirits remaining on Board the "Isabel H", after which the said defendants and the other conspirators would then cause the Steamship "Southern Sword" to proceed to New York City, New York, and there discharge its cargo of alcohol and other distilled spirits at Pier 72, North  
 47 River, New York City.

**OVERT ACTS**

- 48 1. In pursuance of said conspiracy and to effect the objects thereof, on or about the 18th day of October, 1935, at the Southern District of New York and within the jurisdiction of this Court, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marshand, a defendant herein, did cause to be transmitted to one Harold Starr, at New London, Connecticut, via Western Union, at the Hotel Astor, New York City, a sum of money, to wit, \$500.
2. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 18th day of October, 1935, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marshand, a defendant herein, did deliver to one Patrick L. Shea at New London, Connecticut, a sum of money, the exact amount thereof being to the Grand Jurors unknown.
3. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 7th day of November, 1935, at the Southern District of New York and

*Indictment.*

within the jurisdiction of this Court, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marshand, a defendant herein, and Pierre Leveque, alias Durant, alias Durand, alias George Woodrow, not a defendant herein, did cause to be transmitted to Harry Ducos at Yarmouth, Nova Scotia, via Western Union, at the Hotel Astor, New York City, a sum of money, to wit, \$3200. 49

4. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 22nd day of November, 1935, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marshand, a defendant herein, and William Kleb, Jr., alias Walter Adams, not a defendant herein, went to a pier at Keansburg, New Jersey, and assisted in the discharge of a cargo of alcohol from the vessel "Pronto". 50

5. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 23rd day of November, 1935, at the Southern District of New York, and within the jurisdiction of this Court, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marshand, a defendant herein, did have a conversation with Pierre Leveque, alias Durant, alias Durand, alias George Woodrow, not a defendant herein, in the vicinity of 65 Central Park West, New York City. 51

6. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 26th day of November, 1935, at the Southern District of New York and within the jurisdiction of this Court, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marshand, a defendant herein, did cause to be transmitted to Harry Ducos, not a defendant herein, at Halifax, Nova Scotia, via Western Union, at the Hotel Astor, New York City, a sum of money, to wit, \$1,000.



*Indictment.*

52 7. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 15th day of December, 1935, at the Southern District of New York and within the jurisdiction of this Court, Frank Carmine Nardone, alias Frank Carmine, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marshand, Nathan W. Hoffman, alias Nat, defendants herein, did meet and confer with Pierre Leveque, alias Durant, alias Durand, alias George Woodrow, not a defendant herein, at the Hotel Astor, located at Broadway and 44th Street, New York City.

53 8. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 16th day of December, 1935, at the Southern District of New York and within the jurisdiction of this Court, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marshand, a defendant herein, and Pierre Leveque, alias Durant, alias Durand, alias George Woodrow, not a defendant herein, did cause to be transmitted to William Kleb, Jr., alias Walter Adams, not a defendant herein, at Halifax, Nova Scotia, via Western Union, at the Hotel Astor, New York City, a sum of money, to wit, \$1,300.

54 9. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 19th day of December, 1935, at the Southern District of New York and within the jurisdiction of this Court, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marshand, Nathan W. Hoffman, alias Nat, defendants herein, and George H. Geiger, alias Jiggs, and Pierre Leveque, alias Durant, alias Durand, alias George Woodrow, not defendants herein, met and conferred at the Hotel Astor, New York City.

10. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 19th day of December, 1935, at the Southern District of New York and



*Indictment.*

within the jurisdiction of this Court, Burt or Bert Erickson, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marshand, a defendant herein, did cause to be transmitted to Harry Ducos at Halifax, Nova Scotia, via Western Union, at the Hotel Astor, New York City, a sum of money, to wit, \$2,300. 55

11. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 12th day of February, 1936, at the Southern District of New York and within the jurisdiction of this Court, Frank Carmine Nardone, alias Frank Carmine, Nathan W. Hoffman, alias Nat, defendants herein, and Pierre Leveque, alias Durant, alias Durand, alias George Woodrow, and George H. Geiger, alias jiggs, not defendants herein, did appear at the Belfort Restaurant, located at 324 West 46th Street, New York City. 56

12. That further in pursuance of said conspiracy and to effect the objects thereof, on or about the 13th day of February, 1936, Frank Carmine Nardone, alias Frank Carmine, a defendant herein, and Pierre Leveque, alias Durant, alias Durand, alias George Woodrow, not a defendant herein, did have a conversation with one Barney Cooper at Wildwood, New Jersey.

13. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 15th day of February, 1936, at the Southern District of New York and within the jurisdiction of this Court, Frank Carmine Nardone, alias Frank Carmine, a defendant herein, did have a conversation with one Edmond Parrot at the Belfort Restaurant, located at 324 West 46th Street, New York City. 57

14. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 5th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Pierre Leveque, alias Durant,

*Indictment.*

58 alias Durand, alias George Woodrow, not a defendant herein, did cause to be transmitted to Harry Ducos, not a defendant herein, at St. George, Bermuda, via Western Union, at the Hotel Astor, New York City a sum of money, to wit, \$1,300.

15. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 15th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Frank Carmine Nardone, alias Frank Carmine, a defendant herein, and Pierre Leveque, alias Durant, alias Durand, alias George Woodrow, not a defendant herein, did have a conversation with one Walter  
59 McAdams.

16. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 16th day of March, 1936, Hugh Brown, a defendant herein, did have a conversation with one Fred G. Valez on the high seas, off the coast of Virginia.

17. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 16th day of March, 1936, Austin L. Callahan, a defendant herein, did have a conversation with one Ralph R. Pendelton at Newport News, Virginia.

60 18. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 16th day of March, 1936, Austin L. Callahan and Hugh Brown, defendants herein, did have a conversation at Newport News, Virginia.

19. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 17th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Austin L. Callahan and Robert Gottfried, alias Robert Godfrey, alias Robbie, two of the defendants herein, did have a conversation.

*Indictment.*

20. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 17th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Austin L. Callahan, a defendant herein, did appear in the vicinity of Pier 5, East River, New York City. 61

21. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 17th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Hugh Brown, one of the defendants herein, did cause to be docked in the vicinity of Pier 72, North River, a certain vessel known as the "Southern Sword". 62

22. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 20th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Frank Carmine Nardone, alias Frank Carmine, Robert Gottfried, alias Robert Godfrey, alias Robbie, defendants herein, and Pierre Leveque, alias Durant, alias Durand, alias George Woodrow, George H. Geiger, alias Jiggs, and John Saunders, alias Red, alias Big Red, not defendants herein, did meet together at the Belfort Restaurant, located at 324 West 46th Street, New York City. 63

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 88, United States Code).

LAMAR HARDY,  
United States Attorney.

**Endorsement on Indictment.**

C 193-24

**U. S. DISTRICT COURT****THE UNITED STATES OF AMERICA***vs.*

**FRANK CARMINE NARDONE, alias Frank Carmine, BURT or BERT ERICKSON, alias the Swede, alias Harry Rosen, alias Henry Bishop, alias Marshand, NATHAN W. HOFFMAN, alias Nat, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED, alias Robert Godfrey, alias Robbie,**

**Defendants.****INDICTMENT**

**Unlawfully smuggling and clandestine introduction into the United States without making entry at U. S. Custom House certain merchandise, etc., contrary to law.**

**U. S. Rev. St., Sec.****Title 18, Sec. 88, U. S. Code.****LAMAR HARDY*****United States Attorney.*****A TRUE BILL****EDWARD A. STONE*****Foreman.***

*Endorsement on Indictment.*

July 11, 1938—Burt Erickson—Bench Warrant Ordered. 67

Nathan W. Hoffman—Bench Warrant Ordered.

Frank C. Nardone—Pleads not Guilty—Bail \$2000 to be rewritten to cover this Indictment & C 98-300.

Austin L. Callahan Pleads not Guilty—Bail \$2000 to be rewritten to cover this Indictment & C 98-300.

Hugh Brown Pleads not Guilty—Bail \$500 to be rewritten to cover this Indictment & C 98/300.

Robert Gottfried Pleads not Guilty—Bail \$1000 to be rewritten to cover this Indictment & C 98/300.

Paroled to give bail. Knox, J.

Feb. 6, 1939—Nathan W. Hoffman Pleads not Guilty. 68

Bail \$2500. Paroled custody of his Atty to give bail. Patterson, J.

Feb. 14, 1939—Bert Erickson—Surrendered to this Court.

Bail of \$5,000 furnished in East. Dist. of N. Y. to be rewritten to cover this indictment. Paroled to give bail. Knox, J.

Feb. 17, 1939—Burt or Bert Erickson—Bail reduced to

\$2500, on motion of Asst. U.S. Atty. McKnight. Knox, J.

Mar. 10, 1939—Bert Erickson—Pleads Guilty to Count 3.

Counts 1 and 2 dismissed on motion of Mr. Dunigan, Asst. U. S. Atty. Sentence adjourned until after trial of remaining defts. Bail Contd. Deft to remain in Court during trial. Clancy, J. 69

Trial begun as to F. C. Nardone, A. L. Callahan, R. Gottfried, H. Brown and N. W. Hoffman. Motion to dismiss Indictment as to all defendants. Denied. Exceptions as to all defendants.

Mar. 13, 1939—Trial continued as to all defts as of 3/10/39.

Mar. 14, 1939—Trial continued as to all defts as of 3/10/39.



*Endorsement on Indictment.*

- 70 Mar. 15, 1939—Trial continued as to all defts as of 3/10/39.
- Mar. 16, 1939—Trial continued as to all defts as of 3/10/39.
- Mar. 17, 1939—Trial continued as to all defts as of 3/10/39.
- Mar. 20, 1939—Trial continued as to all defts as of 3/10/39.  
Defts motion for a mistrial. Denied. Exception.
- Mar. 21, 1939—Trial continued as to all defts as of 3/10/39.  
Defts motion for a mistrial. Denied. Exception. Government Rests.
- 71 Mar. 22, 1939—Government Rests. Defts move to strike from the record all testimony obtained on the ground that it was obtained in violation of the Supreme Court ruling in the Nardone case. Defts move to dismiss the indictment on all counts as to all defendants. All motions to dismiss. Denied. Exceptions. All defendants rest. Defts renew all motions made at the close of the Government case. All motions—Denied—Exception. Summations made on behalf of deft's., Brown, Callahan, Gottfried and Hoffman. Clancy, J.
- 72 Mar. 23, 1939—Trial continued. Summations made by Mr. Cahill, atty for deft, F. C. Nardone, and by Mr. Dunigan Asst. U. S. Atty for the government. Alternate Jurors #13 and #14, Ordered discharged from further deliberation of this case. Charge by the Court made at 3:05 P.M. Officer sworn. Jury retires at 3:40 P.M. Jury returns at 5:05 P.M. with the following verdict. Guilty on all counts as to all defendants on trial to wit: Frank Carmine Nardone, Austin L. Callahan, Robert Gottfried, Hugh Brown, Nathan W. Hoffman.—  
Deft: ~~B.~~ Erickson—Bail Continued. All motions re: verdict, etc., and the sentences of the defendants adjourned to March 24th 1939 at 2:00 P.M.

*Endorsement on Indictment.*

Motions to set aside verdict as to deft Hugh Brown— 73  
 Denied—Exception. Defts, Nardone, Callahan, Gottfried, Brown, Hoffman. Remanded. Clancy, J.

Mar. 24, 1939—Motion in arrest of Judgment and to set aside verdict as to each defendant—Denied. Exc.

Defendants Nardone, Hoffman, Gottfried, Brown and Callahan sentenced—see judgments filed.

Motion for bail as to Defts Nardone, Hoffman, Gottfried and Callahan—Denied. Exception.

Bail of deft. Callahan on this indictment and C-98/300, discharged. Clancy, J.

May 31, 1939—Bert Erickson—Bail reduced to \$1000. on 74  
 motion of U. S. Attorney. Knox, J.

**Bill of Exceptions.**

76 **UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.**

UNITED STATES OF AMERICA,  
against  
FRANK CARMINÉ NARDONE, NA-  
THAN W. HOFFMAN, ROBERT  
GOTTFRIED,  
Defendants-Appellants.

77 BE IT REMEMBERED that the above entitled cause came on for trial on the 10th day of March, 1939 before Honorable John W. Clancy, United States District Judge, holding the District Court for the Southern District of New York and the following proceedings were had:

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK:**

78 UNITED STATES OF AMERICA,  
against  
FRANK CARMINÉ NARDONE, AUS-  
TIN L. CALLAHAN, HUGH  
BROWN, ROBERT GOTTFRIED,  
NATHAN W. HOFFMAN and  
BERT ERICKSON,  
Defendants.

C. 103-24.

Before:

HON. JOHN W. CLANCY, D. J.,  
and a Jury.

*Motion to Dismiss.*

New York, March 10, 1939.

79

## APPEARANCES:

JOHN T. CAHILL, Esq., United States Attorney,  
 LESTER C. DUNIGAN, Esq., and  
 MAXWELL S. MCKNIGHT, Esq., Assistant U. S. Attorneys,  
 of Counsel.

DAVID V. CAHILL, Esq., and  
 THOMAS GALLAGHER, Esq.,  
 Attorneys for Defendant Frank C. Nardone,

LOUIS HALLE, Esq.,  
 Attorney for Defendant Robert Gottfried.

80

WEGMAN & CLIMENKO, Esqrs.,  
 Attorneys for Nathan W. Hoffman;

JESSE CLIMENKO, Esq.,  
 of Counsel.

JOSEPH P. NOLAN, Esq.,  
 Attorney for Austin L. Callahan;

MISS GERTRUDE SCHWARTZ,  
 of Counsel.

HUGH BROWN,  
 Defendant,  
 in person.

81

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Mr. Dunigan: Defendant Bert Erickson has not pleaded to this indictment. At this time the Government moves to dismiss the substantive counts 1 and 2 with respect to the defendant Bert Erickson and asks that he be required to plead to the third count, that of conspiracy.

Defendant Erickson: I am guilty up to a certain date but after that I am no part of it.

*Motion to Dismiss.*

82 The Court (to Mr. Erickson): Have you consulted with counsel?

Defendant Erickson: Yes, sir.

The Court: Is it on his advice that you plead guilty?

Defendant Erickson: Yes.

(The defendant Erickson pleaded guilty.)

Mr. Dunigan: I suggest that the defendant be continued on bail and sentence be deferred until the outcome of the pending trial, and I ask that the defendant be required to be present during the pending trial.

The Court: Motion granted.

(A jury was duly impaneled and sworn.)

83 (Two alternate jurors were impaneled and sworn.)

(Mr. McKnight made an opening statement to the jury on behalf of the Government.)

Mr. McKnight: (During the opening) The Government will show that many of the names I have referred to were bootleggers and rumrunners who have—

Mr. Cahill: We object to any statement of that kind, going back to the time of the Prohibition Act and not intended to be connected with the issues but only as background.

84 Mr. McKnight: I said I will show that a number of these names were active during prohibition time.

Mr. Cahill: It seems that this matter goes far beyond the indictment and the statement should not have been made and that there is ample ground for a mistrial.

The Court: Do you want one?

Mr. Cahill: Yes, sir.

The Court: I will deny it.

Mr. Cahill: Exception.

The Court: The jury may retire until ten minutes after two. I do not need to tell you not to talk about the case because I know that would be an awful tempta-



*Motion to Dismiss.*

tion. The purpose is to keep the minds of the jurors open. If you talk about it outside you may form an opinion before you have heard the whole of the evidence on both sides and it is unfair until you hear all of the evidence on both sides and I have charged you, because that may make a difference. 85

Mr. Cahill: If the Court please, I took an exception a moment ago to a denial of a motion. I was speaking for all defendants. By an agreement of counsel, if I take an exception of that kind it is intended to be for all defendants.

(Recess to 2:10 P. M.)

86

*AFTERNOON SESSION.*

Mr. Cahill: May it please the Court, we move to dismiss the indictment upon the ground that it fails to state facts sufficient to constitute a cause of action. Secondly, that it fails to apprise the defendants sufficiently of the nature of the accusation against them, sufficiently to enable them to prepare a defense, and does not afford defendants protection against possible other prosecution for the same offense. 87

The Court: There was a motion made prior to this trial by one of the counsel to quash this indictment and I am not going to go over the grounds because they are available for the protection of the defendants if there is occasion to review the indictment. We will have access to that. What is the difference between that motion and the one you are making now?

Mr. Cahill: In some respects they run along together but the grounds are different. I call attention particularly to the third count, that is, the conspiracy count. That

*Motion to Dismiss.*

88 count alleges a conspiracy to violate the so-called Anti-Smuggling Act of August, 1935.

By the way, the indictment alleges that the conspiracy began before the enactment of that statute, but, in addition, we have this fact, that there are no allegations in the conspiracy count that contain even the words of the anti-smuggling statute. The statute is merely referred to as the object of conspiracy, but not beyond that. Our contention is that it is necessary to go further than that, that it must indicate how that statute was violated to some extent so that the defendant will be apprised of what is against him, giving him an opportunity to prepare to defend. There is but a bare reference to it in that paragraph.

89 Then with respect to the second count it is charged that the defendant did unlawfully, wilfully and knowingly conceal. Going back to the conspiracy count, it seems to me to apprise the defendant of one object of the conspiracy and not referring to the other does not give him an opportunity to defend.

90 With respect to the second count accusing defendants of receiving and concealing and also transporting and concealing, our point there is they have combined two separate and distinct offenses in one count and therefore that the count is bad, and generally with regard to the first count the same motion is made.

The Court: I deny your motions.

Mr. Cahill: On behalf of all the defendants we respectfully except.

(At this point the jury entered the courtroom.)

The Court: Does any of the defendants' counsel wish to open now?

Mr. Cahill: No, your Honor, we waive that.

*George Geiger—For Government—Direct.*

GEORGE GEIGER, called as a witness on behalf of the 91  
Government, having been first duly sworn, testified as  
follows:

*Direct examination by Mr. Dunigan:*

I am now employed by the New York & Porto Rico  
Line on the SS. Porto Rico, as Chief radio officer, having  
been connected with the Porto Rico Line for just one year  
this month. I know a man named Pierre LeVeque, becom-  
ing acquainted with him about ten years ago, and see him  
from time to time. I have had big dealings with him. I 92  
was with the United States Line, President Roosevelt, as  
radio officer in 1935. During the latter part of September  
or very early in October, in 1935, I had occasion to meet  
LeVeque. I believe I saw him in his cleaning and dyeing  
establishment on 51st Street, and from there I was told  
to go to the Astor Hotel where I could find him. On going  
to the Astor Hotel, I saw Mr. LeVeque by the telephone pay  
station there. He was with several associates, among whom  
were Bill Kleb, Frank Nardone, Bert Erickson, and Nat  
Hoffman. Government's Exhibit 1 for identification is a  
picture of Bill Kleb. Nardone is sitting over there at the  
end of the bench (identifying Frank Nardone, the defend-  
ant). Nat Hoffman is sitting two seats down from Nardone 93  
(identifying the defendant Nat Hoffman), while Bert Erick-  
son is on the end of that row of gentlemen (identifying the  
defendant Bert Erickson).

(Photograph marked Government's Exhibit 2 for  
identification.)

I know a man by the name of Saunders, whom I called  
Red. Occasionally I would see him in the lobby of the  
Astor, and sometimes in a French restaurant on 48th  
Street, with LeVeque, Nardone and Hoffman. Govern-  
ment's Exhibit 2 for identification is Saunders.

*George Geiger—For Government—Direct.*

4 Government's Exhibit 2 for identification, received in evidence subject to a motion to strike out if connection is not shown.

There were no persons other than Nardone, Hoffman and Erickson at this first meeting in September or October, 1935 when I arrived at the Astor. I was not introduced to Nardone and Hoffman at that first meeting and LeVeque did not say anything to me then about them or about Saunders at that meeting. On this first meeting I had a conversation with LeVeque, during which these men were not present. My main object at the time was to borrow some money, and in the course of the conversation LeVeque told me he was busy again at smuggling. It was all generalities; didn't tell me too much.

Mr. Cahill: I move to strike that out.

The Court: Granted.

Mr. Cahill: Our objection remains.

3 The substance of our conversation was he was smuggling again and I borrowed a few dollars from him. He let me know at that time that he had a radio operator in connection with his smuggling operations but the man he had was unsatisfactory for some reason or other. I cannot remember the reasons he gave me. There was no job there for me but he would be glad to lend me a few dollars at that particular time. That is the conversation I remember. Thereafter I saw LeVeque again pretty shortly after the first conversation about a week. It was at the same place, the Astor, right off the 44th Street entrance to the hotel, to the right of the pay stations as you enter the Astor.

When I saw LeVeque on the second occasion he was not alone. There were several men there. I cannot tell you exactly who, but there were quite a few. I know Nardone

*George Geiger—For Government—Direct.*

was there and Erickson. Who the others were I could not say. I could not say positively if Hoffman or Saunders was there but I am positive that Nardone and Erickson were there. On this second meeting LeVeque asked me if I would be interested in taking over this radio work for the smuggling. This was not with Nardone and Erickson but with LeVeque alone. He said, he would like to have me doing it for him but would have to get the consent of his partners. He said Nardone and Erickson were his partners and before giving me the job he said he would have to have their okay. That is the substance of all the conversation I recall at this second meeting. I then left the hotel with the understanding I was to get a job. I made an appointment to meet him at some other date. Shortly, it was a matter of days, I believe in October, after this second meeting I saw LeVeque again. All these meetings were in the Astor. 97 98

The third time he was not alone, he was very rarely alone over there; always somebody around. I do not recall who was present at the third meeting. I had a conversation with Mr. LeVeque. It was all of a general nature. He told me he would get rid of his radio operator, and as far as his partners were concerned I could have the job if I cared to work for \$40 and he indicated to me that he had discussed it with his partners. 99

He told me baldly he would have to have the okay of his partners before I was hired. And on this third meeting he said if I was willing to work for \$40 a week I could have the job. I was willing to work for \$40.

It was general conversation. He told me what was going on in rough outline. That at that time he told me one of the vessels was in drydock in New London, having just been rammed by a Coast Guard cutter; that there would be nothing doing until the ship came out of drydock and in the meantime I was to mark time and be ready for work.



*George Geiger—For Government—Direct.*

100 In reference to the ramming business he named the Pronto, and the difficulties the Pronto was giving. I knew also of the Isabelle H, I knew of that. I also received a sketchy outline as to what the whole procedure was. That from then on I was considered working for the organization. LeVeque told me I was to take orders from no one but himself and Nardone (to listen to the other two partners, naming Erickson and Hoffman, but not to take specific orders from them.

101 LeVeque supplied me with portable equipment to be put up in very limited space and told me to go out and search and get a place to put up this equipment. The equipment was supposed to communicate over a distance of eight or nine hundred miles with the Pronto and I was to secure a location where that was possible. I was supplied with phones and put the equipment up in 119 Henry Street, Brooklyn. These conversations were in the presence of Nardone, LeVeque and Hoffman.

102 When I put up this equipment I had the understanding with LeVeque; I asked him to keep it all quiet, that nobody should know where it was but LeVeque, and that seemed to be perfectly satisfactory. He said that was agreeable to him. I thereafter gave him the location of the place and my telephone number and he promised to keep it to himself. Shortly after the equipment was installed, the Pronto left New London for Nova Scotia. I gave LeVeque a list of schedules which I wanted the Pronto to keep. The Pronto kept these schedules. I don't know how they got them. I did not give those schedules to anyone except LeVeque.

I discussed with LeVeque smuggling and in those conversations vessels were mentioned and among the names of vessels mentioned was the Pronto and the Isabelle H. They were the only two names that were mentioned.

In these code books there was a list of schedule times and schedule wave lengths at which I could get in touch with those two boats. I was to keep in daily contact with

o *George Geiger—For Government—Direct.*

those boats and keep them informed as to what was going on ashore. They in turn kept us informed as to their position at sea and where they were and when I received orders from LeVeque in code I would transmit them to the Pronto or Isabelle H. I preferred to get the orders at the French restaurant but I could not get them always there, and LeVeque would call me up and tell me what to do. 103

Going back to these meetings at the Hotel Astor, I heard conversations with Nardone, Erickson and LeVeque. Their substance was the activities of the Pronto and the Isabelle H, and the most logical place to work. I heard the names Pronto and Isabelle H mentioned by Nardone, Hoffman, Erickson and LeVeque many times. The Pronto left the schedules and I knew she left New London. Outside of the fact that it went north I didn't know where it went to. 104

The next communication was when LeVeque told me the Pronto was on the way south with a load and I was told to keep daily schedules and keep track of her position and the Coast Guard, and things like that. These conversations took place in the French restaurant. In all these conversations four or five people were always present. Nardone and Hoffman were always present with LeVeque. Sometimes Hoffman was there. Those conversations had to do with activities. 105

I was to keep LeVeque in touch as to where the vessels were and as to weather conditions, and so on. When the time came to work he would tell me where the vessels would have to go and transmit the order. I would put that into code and transmit it to the Pronto and the Isabelle H. They generally were together. I believe the first time they came south they worked around Jersey some place. I myself did not know where the position was, where this stuff was to come in. I was told to keep in half-hourly contact with those positions.

*George Geiger—For Government—Direct.*

When LeVeque told me that the two vessels were coming south with a load, he told me the load consisted of alcohol. He did not say where the boats had obtained the alcohol. This particular operation with respect to New Jersey happened only once. I did not tell the boats where to come in; they were just told to come in. How they knew I don't know. My orders were to tell them to come in. After this New Jersey operation the ships for some reason or other didn't keep my schedules and the next morning I went over to work and found out there had been trouble in New Jersey. I came to New York and I went to the French restaurant. LeVeque was there. I am not so sure about Hoffman. Nardone was, too. Those two only, three I can positively remember at the French restaurant that morning. My best recollection is that Hoffman was there. There was a great deal of agitation that morning and the chief source of concern seemed to be that there was a shooting affair. All that LeVeque said was—he was pretty agitated—that there was a shooting affair. He was greatly agitated. That is all I remember at that meeting. That is what I recollect that was said. This conversation was in the presence of the others.

LeVeque paid me my salary on the spot when he had it. A lot of times he didn't have that much money and would have to get it from Nardone. Sometimes I would get it and sometimes I would not. It would depend on who had it. I saw Nardone pass over money to pay my salary but he never paid me my salary directly.

During this time I have been referring to I did not see Bill Kleb often. Sometimes I would see Saunders and sometimes he would be out of town or at least out of my sight. I would not see him at those meetings. On occasions a man named Fred Velez would come around for the same reason I came.

*George Geiger—For Government—Direct.*

After this conversation with LeVeque and Nardone 109  
 concerning the Keansburg incident the next thing that  
 transpired, as I remember it, the vessels both left the  
 coast and went north. It is difficult to state one of these  
 alleged incidents from the other and to give the date of  
 this conversation with LeVeque concerning this Keans-  
 burg incident. It would be a month or two months  
 between the first meeting and the Keansburg incident.  
 Going back a moment prior to the Keansburg incident I  
 blew out two of the high-power tubes in the set. I had  
 to get others. I didn't have the money for them so I  
 phoned LeVeque, and told him the situation I was in 110  
 and he said he was in the St. George lobby and "Frank  
 will be over and give you some money." Thereafter, I met  
 Frank Nardone in the St. George. I told him at the time  
 what I needed the money for, needed it for the tubes. While  
 I was out there I told him where the vessels were, weather  
 conditions, and so on. They always wanted to know what the  
 weather was and where the boats were lying and at that  
 time he paid me for two tubes so I could get the set  
 running again. After this conversation in the Bellfort  
 Restaurant concerning the Keansburg incident things were  
 quiet for a while. I know the boats left the coast and went  
 north again. During this time about once a week I would 111  
 go to New York and meet at the Astor or Bellfort and tell  
 them what was going on. Erickson was there; Hoffman  
 was there; sometimes Kleb would be there; Saunders com-  
 ing and going, and he would keep me posted as to the  
 probable time we would be working again. The next time  
 I was told they would come down the coast when the  
 Isabelle H was being towed by the Pronto and I had to  
 keep close watch on them so I kept daily signals from  
 then on until they got down to South Carolina. During  
 these trips that I just talked about I did not hear any con-  
 versations about South Carolina outside of the fact that  
 they were going to work down there.



*George Geiger—For Government—Direct.*

112 LeVeque told me that the vessels were going down the coast bound for South Carolina and I should keep daily watch on them, daily signals, weather conditions, to see that the Coast Guard were not chasing them and I did this until the vessels were down off Charleston, South Carolina. These conversations were in the presence of Nardone, Hoffman and Erickson. LeVeque told me to keep in touch both with the vessels and with him at the Bellfort Restaurant. The next specific orders I got were to have the Pronto come in, everything was all right. I put these orders in code and relayed them to the Pronto. This was at night. I was not told by LeVeque where the Pronto was coming, but I was just told to tell the Pronto to come in.

113 Q. Everything was all right? A. Yes.

The next word I got from the Isabelle H was that she saw shooting. She told me that and I relayed these orders to LeVeque at the Bellfort and he seemed greatly agitated about it. That is all the information I could give. I had to go over to the French restaurant and was told that the Pronto had been seized. LeVeque and his partners Nardone and Hoffman were always there. I was told by LeVeque in the presence of the other three to instruct the Isabelle H to proceed to Bermuda. I sent the boat to Bermuda, kept in contact with her all the way to Bermuda and when she finally arrived at St. George I notified LeVeque that she was there. I was told to keep daily signals if possible and to keep standing by for any further orders.

114 I do not recall the approximate date when I told the Isabelle H to go down to St. George. The Isabelle H then laid at St. George for quite a while until I received other orders. Once in a while I was in contact with her. It was hard to keep communications there because it was land-locked, a land-locked harbor, and it was hard to get through there but occasionally I did get through. I believe one message was a request for money, to have money sent down



*George Geiger—For Government—Direct.*

there. I gave that request to LeVeque. Then I was just told to have her proceed toward the coast and I would get my orders while she was on the way. 115

The next day I was told to tell her to take up a position, a safe position, near Winter Quarters Light Vessel. Shortly after this LeVeque told me at one of these meetings, in the Bellfort Lunch in the presence of all to work with an American cargo vessel a 2,000 ton freighter simply off Winter Quarters Light, that is off the New Jersey coast. That she was to work with an American cargo vessel off Winter Quarters Light and she was to occupy a position where she could get in Winter Quarters Light at short notice, and I was to keep half-hour signals. I was told what the steamer looked like at the arrival time. I relayed this information to the Isabelle H, and the time to get there and how to blink lights so as not to go to the wrong vessel. Late at night I got word from the Isabelle H that contact had been made and cargo was being transferred. I don't recall the time the meeting was to take place, but it was the time blinkers were used. 116

Going back to the time when LeVeque told me that two vessels were proceeding south with a load of alcohol, he did not tell me how much was on board. No, I still don't know how much was carried. 117

I do not know how much was on the Pronto when she was seized, nor do I know how much remained on the Isabelle H after the Pronto was seized. I was informed by the Isabelle H that contact had been made with this American steamer. Then I think the Isabelle H told me to call again in a few hours. Naturally they wanted to keep the radio quiet while transfer was being made. It was rather late at night when I began contacting the Isabelle H. She told me, okay, the cargo had been transferred, she was on her way north. She gave me the probable time of her arrival in New York. I forget the time. This information I phoned

*George Geiger—For Government—Direct.*

118 right over to the French restaurant. LeVeque seemed pleased; that is all I remember. I spoke to him about the contacts made with the Isabelle H. And that contact had been made successfully and the steamer was on the way to New York. And I gave him the approximate time of her arrival. Very early the next morning he called me up again, told me Nardone was coming over for verification and to meet him in the St. George. I met Nardone in the St. George lobby and verified it, told him what time contact had been made and what time the ship was coming in to New York. I believe this was after Christmas of 1935. Nardone did not say anything else; I told him everything

119 was okay.

After this conversation with Nardone in the Hotel St. George I told the Isabelle H to proceed north, stay out where it was safe and go north. I forget where I had told her to go, Nova Scotia or St. Pierre.

At the time when the Pronto was seized and the Isabelle H was in St. George, Bermuda, I recall conversation with LeVeque, Nardone and Erickson and Hoffman concerning serial numbers on cases but I couldn't quote it. The substance of it was all the partners seemed to be greatly concerned over the fact that the serial numbers found at St. George corresponded pretty closely with the seized

120 goods and that the Government knew there was a tie-up. By all the partners I mean LeVeque, Nardone, Erickson and Hoffman.

On March 20, 1936 I was in the Bellfort Lunch or Bellfort Restaurant. LeVeque, Nardone, myself, Red Saunders and this little fellow over here called Robbie, I don't know his name (indicating the defendant Gottfried) were present. I was reading a newspaper at the next table, we were all eating, had just finished a meal rather, when the Federal men came in and arrested everybody in the place. They took us up to 42nd Street, I think it is, Police Station there; from

*George Geiger—For Government—Cross.*

there downtown to the Center Street Police Station; from there to the Federal Detention. I was in this building. I was left at Center Street and taken to the Federal Detention Building the next morning. Then I was indicted in South Carolina. I appeared in 1936 and pleaded guilty to the indictment. I was sentenced to Petersburg, Virginia, for six months, and I served that time. 121

When the Federal men came into the Restaurant I was waiting for some money. That is the reason I was there. LeVeque promised me if I would just wait he would have something for me that day or the next day. Sometimes I got it. He told me to wait, that there was some trouble with the goods. He never elaborated on it. That the alcohol had not come in. 122

Mr. Cahill: There is a certain motion with regard to the testimony of this witness which we expect to take up later.

The Court: The Court has been told of the motion.

Mr. Cahill: And you will reserve decision on that motion?

The Court: Yes.

*Cross-examination by Mr. Cahill:*

These incidents I testified to occurred three and a half years ago or so, from the early part of October, 1935 or latter September to March, 1936. I did not discuss any of these incidents with the Government immediately after they occurred. Nor did I testify at the first trial just to the Grand Jury, that is all. The first time in connection with this case I made contact with the Government. Mr. LeVeque took me down to a building on Cedar Street, the new Federal Building at Church Street there, and I went to the office 123

*George Geiger—For Government—Cross.*

124 of Mr. Dunigan. I do not know Mr. Dunigan's first name. When I say Mr. Dunigan I don't mean this Mr. Dunigan, but Mr. Dunigan connected with the Alcohol Tax Unit. It was in April of 1938. I have the subpoena here. I can tell because I showed up before the Grand Jury immediately following that. I had been in jail in Virginia, Petersburg, Virginia, under a judgment of the South Carolina Court until March, 1937.

I don't believe there was any questioning before Mr. Dunigan at Cedar and Vesey Streets, but he asked me to come up and see Mr. McKnight, that is the Assistant United States Attorney in this case, which I did.

125 There were no telegrams shown to me at that time, nor did the Government discuss with me any of the evidence which they had or was said to have had in connection with this case. I have testified to a great many conversations with various defendants or other persons in connection with this case. I didn't keep track of the number. I am not prepared to state positively under oath just who was present on those occasions because I cannot remember those dates, it is too long ago. I am not guessing who was present because the same men were present on pretty near all of them. Sometimes one would be missing and sometimes another would be missing. But I heard during that

126 heard some of them had left the country. I heard that Kleb and Saunders had gone south to South Carolina and on one occasion Erickson disappeared. I don't know where he went to or for how long though it was for a matter of weeks.

I cannot state positively whether he was at any of these meetings, outside of saying that he was at the majority of them. In fact, there were so many of those meetings, that I am not able to testify who was present at a particular meeting. I can remember who said what at any of these meetings. But I can not testify with particularity what



*George Geiger—For Government—Cross.*

every one of these persons said in substance; what took place at any one of these meetings, I believe I can. 127

LeVeque was the one who gave me orders as to what messages I should transmit and when I should receive messages. In the course of my statements to the representatives of the Government, Mr. Dunigan and Mr. McKnight, and anybody else who questioned me they did not refresh my recollection with any memoranda of their own, but I have asked them roughly when certain things happened just to refresh my own memory such as the Pronto being in New London. I couldn't remember when that was. They told me of that one incident. Though Mr. McKnight had a basket full of papers. I did see a photograph of myself and a photograph of the Pronto. I didn't refer to them on those occasions. They referred to papers but I didn't know what they were. 128

And after reading the papers they asked me questions and Mr. McKnight read the papers when I was there. No, only Mr. McKnight and the stenographer were there. I didn't know what the papers outside of the fact that they referred to me because my picture was in there. That was April, 1938, because two weeks later I was taken into the Grand Jury. That was May 5th. I did nothing but merely consented to be a witness. Nothing was said to me about the prosecution of myself in any other than the South Carolina case nor was anything said about the part I was supposed to have played in these other cases. That was not discussed with me at all. I was not asked about it. I was asked by Mr. Dunigan if I would testify. As I said I was taken to see Mr. McKnight and I was asked all these questions. I did not hear discussed the treatment that was to be given to any other person testifying for the Government. Yes, I was the only one there at that time, who had parts in both transactions, but I do remember Captain Velez outside of the Grand Jury room and I spoke to him. LeVeque 129



*George Geiger—For Government—Cross.*

130 was present when I went to Church Street. He took me there. He did not take me to Mr. McKnight's office. And he was not at Mr. McKnight's office with me. No, I don't think I saw him there.

*By Mr. Climenko:*

I had known LeVeque for many years prior to 1935, I met Nathan Hoffman for the first time in the Astor Hotel. It was one of those very early meetings, one of the few times I saw LeVeque, some time in October, 1935. At that time I already knew Mr. LeVeque for at least eight years. 131 I cannot give you the calendar date when I met Nathan Hoffman. It was in the spring. I didn't see a lot of him after a few times in the Bellfort Restaurant. I think I saw him around there four or five times. Then I did not see him any more. He seemed just to take a back seat or was not around at most of these conferences after the early spring, when the Pronto was around New Jersey, before she went south. I knew he was up there but infrequently. I saw Nathan Hoffman about a dozen times. That is all I can say.

I did not see the indictment, so as to know that I am named as a co-conspirator but not as a defendant. I did not take any orders from Nathan Hoffman, I was told not to. 132 And he never offered to give me any orders. I said in response to a question I was not asked that, I was told not to because I was merely trying to clarify it. I volunteered the suggestion that I was told not to take orders from him.

*By Mr. Halle:*

I said I was in the Bellefort Restaurant on March 20 when I was arrested and I believe that Gottfried

*George Geiger—For Government—Redirect.*

was in the restaurant at that time. It is a fact that he came 133  
into the restaurant after the arrest took place by the  
officers.

*By Mr. Nolan:*

I mentioned I knew the man named Fred Velez five or  
six years. We were mutual friends, and I know LeVeque  
since about 1927—1928. I was friendly enough with Le-  
Veque to borrow money from him.

*By Defendant Brown:*

I saw you (Defendant Brown) in West Street. I still 134  
don't know what ship you were Master of. I don't know  
your name so I cannot tell you if I heard your name men-  
tioned in any conversation.

*Redirect examination by Mr. Dunigan:*

I said that I could not give the exact conversations  
at these various meetings in answer to Mr. Cahill's ques-  
tion or any one particular meeting because there were so  
many of these meetings. At these same meetings LeVeque,  
Hoffman, Nardone and Saunders were present. And these 135  
people that I mentioned had many meetings and the an-  
swer in relation to Mr. Cahill's questions were general dis-  
cussions among the group. What I told you was something  
said at the conversation. I did testify to specific conversa-  
tions at the St. George with Nardone.

At these five or six times when I saw Hoffman at the  
Belifort Restaurant the conversations were usually at one  
table, LeVeque, Nardone, Hoffman, Erickson—we would  
be at the same table. I would generally be at the same table,  
too. I would wait until they came to an agreement and

*George Geiger—For Government—Redirect.*

what my orders should be. And when the orders were given to me they were given in the presence of all.

After going to the Bellfort I did not go to the Astor. I do not know when the first meeting at the Bellfort took place. Outside of the fact it was early in the year 1936. I have a vague recollection of it, that is all I can say. That I saw Hoffman at the Bellfort 5 or 6 times.

If the Court please, counsel for the defendants have already signified their desire to make a motion with respect to this witness' testimony. On behalf of all the defendants I now formally move that the testimony of the witness Geiger be stricken from the record and that the jury be instructed to disregard any evidence given by this witness on the ground that the evidence was obtained by the unlawful interception of telephone and telegraph messages, by the process commonly known as wire-tapping, in violation of Section 605 of the Federal Communications Act, that the existence of the witness, the fact that he was a witness to some of the transactions and the relations between the defendants and of the witness with the defendants and other persons alleged to be cooperating with them was revealed by the unlawful interceptions of telephone and telegram messages and that the Government used the records of these interceptions in preparation for this trial and for obtaining other witnesses and other evidence against the defendants.

The Court then announced that this matter would be taken up later in the trial.

*Eben G. Babbidge—For Government—Direct.*

EBEN G. BABBIDGE, called as a witness on behalf of the Government, having been first duly sworn, testified as follows: 139

*Direct examination by Mr. McKnight:*

I am Captain on a Ferryboat in Penobscot Bay, Maine. I was a Marine engineer on the Southern Sword. I had been so employed about six weeks. That would be from about the 1st of February, if I remember correctly. I know Austin L. Callahan. He is the 2nd gentleman from the far rail over on the first bench seat. (Identifying the defendant Austin L. Callahan.) 140

I first saw him in his office and later I saw him on a ship. I understood at that time that he was the manager and part owner, but I do not know of my own knowledge that he was part owner. I know a company of the name Elco Steamship Co.; though I do not know who is president of that company. I recall the last trip of the Southern Sword. It left from Newport News.

Captain Brown was in command prior to that trip. He was not the regular captain of the Southern Sword. Captain Ralph Pendleton was the regular captain. I know Captain Pendleton. When the Southern Sword left Newport News we stopped that evening out at sea. I cannot say when we stopped. I was assistant engineer on the trip. 141

I just saw the top of the boat looking from the porthole. Later on I was out on deck. I saw them loading these cases of stuff about this long, that deep and that wide (indicating). I did not see or smell what was in them. There was no odor to me. I cannot smell. I did not speak to Captain Hugh Brown on that occasion nor did I speak to him on any occasion about the contents of the cargo. I recall this boat when it came to New York Harbor. When it came in the harbor we were boarded at Red Hook.

*Eben G. Babbidge—For Government—Cross.*

142 If I remember correctly some of the customs men came on board. I recall a boat coming alongside when we came into New York Harbor on the occasion when the cargo had been transferred at sea. I just noticed this tow boat and saw Mr. Callahan get off the tow boat. He stayed on possibly two minutes, going up to the pilot house. Then he got back on the tug again.

After that the Southern Sword went up the North River. How far up I cannot say nor can I say what happened up there. I was not on deck at the time. I was off watch during this time and I went to bed shortly after, so I don't know what happened after that.

143 During the time I was on the Southern Sword it never went up the North River before. We used to go through here on the way to Bridgeport, Connecticut. When the boat left New York it went to Bridgeport. I cannot fix the time when this occurred. Captain Ralph Pendleton joined the ship in Bridgeport and took over command from Captain Brown. Brown is in Court.

He is the first gentleman on the first end here. (Identifying the defendant Hugh Brown.)

*By Mr. Nolan:*

144 I was employed on this ship approximately six—seven weeks. Captain Pendleton was not captain all the six weeks I was on board that ship.

*By Defendant Brown:*

I cannot say to be exact when I joined the ship. Captain Pendleton was captain. He joined the ship at the same time I did in Bridgeport. I do not know he was captain during all the time I was there except half the trip. I had not seen Captain Pendleton brought on—I believe only being paid off and sent from New York.



*Discussion of Counsel.*

Q. That is right, isn't it? A. Yes.

145

Q. Weren't you aboard when we went to Jersey City and got the castor oil bean seeds for Norfolk? A. Yes.

Q. We did go up the North River? A. That is New Jersey.

Q. That is the North River, isn't it? A. I guess so.

(Adjourned to March 18, 1939, at 2:00 P. M.)

(The following proceedings were held in the absence of the jury.)

146

Mr. Dunigan: I was thinking if Mr. Nolan should leave the courtroom before the adjournment there should be a stipulation to the effect that it is done by and with the consent of whatever defendant he represents and I will stipulate that in his absence no testimony will be given affecting his client.

Mr. Nolan:

I do not represent him. He is the attorney for himself (referring to defendant Brown). I have explained to the Court that my brother-in-law, Judge Watkins, died today and I should leave. Mr. Dunigan stipulates that no testimony will be offered as to my client nor concerning you, Mr. Brown.

147

Mr. Dunigan: I consent.

Mr. Cahill: If your Honor please, it was stated to you in the absence of the jury, at the bench, that counsel for the defendants wished to make a motion with respect to the testimony of the witness Geiger and later I stated they would proceed with the testimony reserving this motion to strike from the record the testimony of the witness

*Discussion of Counsel.*

148 Geiger on the ground this testimony represents the results and proof of an unlawful interception of wires to the defendants. It is urged that the knowledge gained through this wire tapping, as it is commonly called, though not perhaps by one step but two steps, and it makes no difference whether it was one step or two steps—in other words, it is as if the statements of any defendants heard over the wire—

The Court: Where is there any testimony that anything was heard over the wire?

Mr. Cahill: We propose to offer and make a motion that we be allowed to prove that the testimony of Geiger that the  
 149 defendants were in connection with each other and that perhaps in two places—in connection with another case there was a hearing before Commissioner Platt and Mr. Kozac testified it was made clear in that testimony that the very existence of Geiger and his connection with those transactions came from that wire tapping. Whether your Honor knows it or not this case has been to the United States Supreme Court on the question of whether there was wire tapping. In the record of that case on appeal, which was presented to me recently, I find testimony of Kozac's and testimony of tapping of wires included in the record. As a matter of fact, the action was based on that wire tapping. That decision did not  
 150 make a statement as to intra-state wire tapping but the logic would apply to either, and since that time a verdict has been set aside, but the logic, as I see it, applies to intra-state. The name of Geiger was brought in there and it was made clear that the Government received its information by tapping the wire not only of Geiger but of all the defendants alleged to have participated in these conversations.

Now then the logic of these various decisions and the law itself indicates that if you get that kind of situation Section 605 provides that no use whatever can be made of

*Discussion of Counsel.*

evidence obtained in that way. The law, Section 605 of the Communications Act, is on all fours with the Fourth and Fifth Amendments of the Constitution, and the Government, once it has overstepped the bounds and obtained its evidence, isn't able to go farther. 151

It is true if by wholly independent means it obtained evidence of that kind that evidence could be used but that means it must be evidence which the witness testifies to on the stand, but they did not get the story except by tapping wires:

The Court: Do you seriously contend that if by tapping wires they ascertained information the Government could not use that testimony in prosecuting for a crime? 152

Mr. Cahill: If they obtained the start of that since the law provides that no use could be made of that evidence obtained, at the start that evidence must be abandoned. It doesn't make any difference, if you take two steps or one, if you obtained the story and get a witness to add more than you got over the wire the ban still exists. That is a very important statute, banning from use information obtained by the tapping of wires. There was a question, in the prior Nardone case, that went to the Supreme Court and the Supreme Court expressly decided that. The Court will see what was meant by wire tapping.

The Court: I will hold that no grounds appear before me that Geiger's testimony was obtained by wire tapping. 153

Mr. Cahill: We are making an offer of proof, that the very proof as to the existence of Geiger and transactions with—

The Court: You mean the fact that he had transactions with them?

Mr. Cahill: Yes, sir, that that was obtained by the Government as shown in the record before Commissioner Platt and by the record in the Nardone case before this

*Discussion of Counsel.*

154 Court, we offer to prove by this and other means that the information which the Government received came from wire tapping and that wire tapping led to the evidence of Geiger in this case.

The Court: You have not pointed out anything except identity.

Mr. Cahill: The two records which I have here, one from the United States Attorney and a copy of the record—

The Court: I will allow you to state in the record what offer of proof you will make.

155 Mr. Cahill: We offer to prove that it was testified by Mr. Kozac of the Alcohol Tax Unit as one witness, that he did not know Geiger or Nardone or any of the defendants prior to the tapping of those wires; that in the course of the tapping of the wires he identified them as the voices and subsequently when he conferred with them he connected them with the individuals, and the offer of proof refers to conversations in which Geiger and others are said to have referred to defendants by certain names. Mr. Kozac's testimony was that there was no proof; that we offered to call Mr. Kozac in a preliminary inquiry on this motion; that he had no acquaintance with them, and that it is clear the wire tapping made the identification of the individuals. On account of the date when the hearing was held, April 10, 1936,  
156 and the trial held in December, 1936, it is clear that the basis and the origin of their proof was this wire tapping, and that the evidence of Geiger represents the proof of the wire tapping.

The Court: Motion denied.

Mr. Cahill: Exception.

Mr. Halle: The defendants further are prepared to offer proof that the Government, prior to the commencement of the tapping of the wires, wherein they learned of the existence of the activities which are now embodied in this indictment, knew nothing at all about such activities;

*Discussion of Counsel.*

that all of the acts complained of in this indictment became known to the Government solely through or from this wire tapping.

157

The Court: What is that last? Everything they are going to prove they got through wire tapping? How do you know that?

Mr. Halle: I was in the first case. I carried the case to the United States Supreme Court. I was before the Commissioner. I examined Mr. Kozac.

The Court: You wouldn't expect of me that I knew what he was going to prove.

Mr. Halle: For the purpose of making the record clear may I assert this: It is a matter of record before the Commissioner that the Government witnesses called in a removal proceeding to South Carolina, which this indictment now includes, the Government officers admitted they knew nobody in this case, all they knew were voices, they did not know what was being said nor what to expect, and that they learned of this from that wire tapping. That is in the record.

158

The Court: I know what is in the record. I am the judge that passed on the removal.

Mr. Halle: Not in that removal—I am talking of the first removal. Your Honor passed on the second removal. May I say this, the reason Commissioner Platt refused to grant the motion to remove the defendants in the first removal was that the officers testified they could not say when they testified before the Grand Jury in South Carolina, they could not say they did not even know them at that time, that only after the arrest they checked up their voices with the sound over the telephone and for that reason had to go down there and get a second indictment. That was the matter before your Honor, so that I daresay, with confidence, that the whole case as made by the Government and as the Government intends to bring out here, is based

159



*Discussion of Counsel.*

60 entirely from the beginning of this wire tapping and what is based on this wire tapping.

Mr. Climenko: I suppose there should be something said that we join in the motion with respect to the witness Geiger, if there is anything in the point, and I think there is—

The Court: I don't know of anything in Mr. Geiger's testimony other than he walked into Mr. Dunigan's office and confessed.

Mr. Climenko: We are not free to say that after the evidence obtained by Mr. Cahill.

61 The Court: What is there contradictory in Geiger saying before Commissioner Platt that he did not know them and then walking into Mr. Dunigan's office and telling what he knew? Motion denied.

Mr. Nolan: I feel also that the records of the steamships are on the same basis, produced by Geiger after wire tapping, and that they therefore are subject to the same objection.

Mr. Dunigan: Do I understand the offer of proof is based solely on the record of the prior trial and the witness Kozac?

62 Mr. Cahill: It was intended to include the calling of Mr. Kozac on this preliminary inquiry and possibly agents of the Government.

Mr. Dunigan: I think the offer of proof should indicate what witnesses the defendants expect to call.

Mr. Cahill: There is nothing hidden about it and the defendants should not indicate any more than the Government should indicate what witnesses they will produce at the trial.

The Court: Except that you are making the motion.

Mr. Cahill: Oh yes, but I would not limit myself. It may happen in the course of the examination of Mr. Kozac I may need the testimony of someone else. It is suggested that I may perhaps offer a little further—

*John J. Humphreys—For Government—Direct.*

The Court: I think the whole motion is very untimely. 163  
This business of asking any court to assume, when nothing appears in the record, that evidence was obtained in a certain way, I think is silly. I think you should wait.

Mr. Cahill: We offer to call Mr. Kozac.

The Court: I understand that, but if you are walking on one side of Broadway and I on the other, it does not make a team of us.

Mr. Cahill: We offer to call Mr. Geiger. This is a motion in behalf of all defendants.

The Court: I deny the motion.

Mr. Cahill: Exception in behalf of all the defendants.

(The jury entered the courtroom at 2:45 P. M.)

164

JOHN J. HUMPHREYS, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

I am manager of the Service Department of the Western Union Telegraph Company. And in that capacity I am familiar with the records of the Western Union, and with the procedure where money is sent to other States, that procedure is to transmit the message to the paying office.

165

A draft is made out at the paying office and delivered to the payee who endorses it. We cash it. The draft is sent back to the originating point. We match it up, file it, and send it back with a money order.

(Papers marked Government's Exhibits 3 to 29 for Identification.)

*John Pellepiere—For Government—Direct.*  
*James Everett Pike—For Government—Direct.*

166

Government's Exhibits for identification 3 to 29 both the telegram and the accompanying check came from the records of the Western Union.

(Witness excused.)

(Paper marked Government's Exhibit 30 for Identification.)

167

JOHN PELLEPIERE, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

I am Supervisor, Postal Telegraph, and custodian of files. Government's Exhibit 30 marked for identification is from our files.

(Witness excused.)

168

JAMES EVERETT PIKE, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

I am Marine Special Agent, with Aetna Life, in October, 1935, I was vice-president and general manager of the East Coast Shipyards, during the month of October I saw a boat called the Pronto. I first saw it in the early part of October while the vessel was repaired at the shipyard that I was

*James Everett Pike—For Government—Direct.*

operating. Captain Conrad came to see me in connection with the operating of the boat, he was in command of the Pronto. (Paper marked Government's Exhibit 31 for identification.)

Government's Exhibit 31 for Identification is a picture of Captain Conrad. (Government's Exhibit 31 received in evidence.) I first became acquainted with Captain Conrad when he came to the shipyard I was operating, when he asked me if I would be interested in raising and salvaging a boat which he was in command of which later turned out to be the Pronto. I told him I would. I entered into an agreement with him to raise the Pronto for \$300 and bring it into my shipyard to see if she could be repaired. I subsequently raised the Pronto and entered into an agreement with Captain Conrad to repair the damage to the Pronto for the sum of \$1800. We then repaired the Pronto. The only further conversation with Captain Conrad was as the work was going on. I met a man named Bill and had conversations with him, only as to the method of repair work on the Pronto. Government's Exhibit 1 in evidence is the man Bill who came to see me. I have since found out what his last name was. I did not at that time. It is Kleb, I think, Kleck or Kleb.

I received \$1800 payment. I received those payments partly in cash and partly in Western Union money orders for the repair of the Pronto. I am quite sure I saw Captain Conrad thereafter because I made the arrangements for payment through him.

The signature on the reverse side of Exhibit 27 for identification is my signature. It is part of the money that I received at that time. I know a man by the name of Harold Starr. He is a friend of mine. The owner of a drug store in New London, Connecticut. I received money from him in connection with the Pronto.

Captain Conrad said he would rather have the money paid through someone else to me. I suggested Harold Starr.

*Clarence O. Brown—For Government—Direct.*

172 Government's Exhibit 22 for identification, is a Western Union money order blank, and bears my signature on the reverse side. I received it in payment for the Pronto repairs, the other signature on it is Harold Starr. I have seen him write.

Government's Exhibit 24 for identification bears Harold Starr's signature on the reverse. That is also money received for payment of the Pronto repairs. I received some money in connection with the Pronto toward the end of October, there were some minor accounts about \$60 that I required to be paid before I would allow the boat to leave. I don't know the name of the one who paid me.

173 He was a young chap and told me that he came from Mr. Halle.

I am quite certain the date the boat left is approximately the 26th or 27th of October, 1935.

(Witness excused.)

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CLARENCE O. BROWN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

174 *Direct examination by Mr. Dunigan:*

I am Inspector of Customs and acting storekeeper at the Port of Charleston, and was acting in that capacity in the early part of January, 1936. (Box marked Government's Exhibit 32 for identification.)

I first saw Government's Exhibit 32 for identification on January 22, 1936 in the hold of the motorship Pronto, when the vessel was brought to the custom house dock to be unladen and stored in custom house. After I saw it in the hold of the Pronto. The exhibit with other cases were



*Clarence O. Brouce—For Government—Cross.*

*William J. Kleb—For Government—Direct.*

stored in the basement of the custom house and have been turned over to the Navy Yard, there were 762 cases and 71 cans of three gallons each on the Pronto. Government's Exhibit 32 for identification has remained in the custom house, stored there, this is my writing on Government's Exhibit 2, the word "hold". I remember this particular case, Government's Exhibit 32 for identification. And it has been in my custody until I delivered it to Mr. Dunigan this morning.

*By Defendant Brown:*

Q. Can you swear that case was ever on my ship? A. What is your ship?

WILLIAM J. KLEB, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

I am a gasoline dealer and my place of business is located at Freeport, Long Island. I do not know the defendant Frank Nardone nor did I ever hear of a man by the name of Frank Nardone. I do not know the defendant Nat Hoffman though I might have heard that. I heard a lot of names. I don't remember whether or not I ever did hear it. I know a man by the name of Red Saunders from Lewisburg, where I was sentenced to a year and a day on the Pronto case. I don't remember correctly where I first met Red Saunders—it may have been in 1927 or 1928, I am not sure. I am sure that I do not know a man by the

*William J. Kleb—For Government—Direct.*

178 name of Frank Nardone. I know a man by the name of Bert Erickson although I don't remember exactly where I first met him. My best recollection is probably four, five six years ago. It is not clear in my mind. I may have met him on the road, for all I know, I don't remember. I can not state where I did meet him. I wouldn't remember if I had a conversation at the first meeting. I never had any business dealings, direct or indirect, with Bert Erickson nor did I ever receive any money from Bert Erickson.

179 I have heard of a man named Frank Carmine about 6 years ago though I do not know him. (Paper marked Government's Exhibit 33 for identification.) I do not recognize Government's Exhibit 33 for identification. I may have seen a man that resembled that photograph but I don't remember him offhand. (Paper marked Government's Exhibit 34 for identification.) I do not recognize Government's Exhibit 34 for identification. I may have seen a man that resembled that but I could not say for sure it was Mr. Hoffman. I wouldn't know if it were Mr. Hoffman. I do not know a man by the name of Geiger nor did I ever hear of that name. I know a man named Van Austen about 15 years. He works for me at present as he was in 1935, as a captain on a boat, the Monolo, spelt M-o-n-o-l-a, I believe. The Monololo was engaged in bringing alcohol to the United States.

180 The boat is registered in the Custom House and was operating in the territory in and around Freeport. I am sorry to say I made one trip with the boat and lost the alcohol.

Q. Did you intend to pay the duty on that alcohol? A. I didn't own the alcohol.

I didn't own the alcohol that was on board. It was owned by a party by the name of George but I don't remember his last name. (Paper marked Government's Ex-

*William J. Kleb—For Government—Direct.*

hibit 35 for identification.) Government's Exhibit 35 for 181  
identification is a picture of Van Austen. Government's Ex-  
hibit 2 for identification is a picture of Red Saunders.

(Government's Exhibit 35 for identification re-  
ceived in evidence.)

Mr. Dunigan: I have a statement from this man.  
He is clearly hostile. I ask permission of the Court  
to ask him leading questions and to cross-examine.

Mr. Cahill: No foundation has been laid for that  
sort of examination.

The Court: I will allow it.

Mr. Cahill: Exception.

182

I have seen Mr. Dunigan on different occasions, and I  
know Mr. McKnight, having seen him on different occa-  
sions. I spoke to both gentlemen about the case. It might  
have been in Mr. McKnight's office on February 10, 1939.  
I have had three or four visits to Mr. McKnight's office.

I saw Mr. Kozac, the gentleman sitting to Mr. Mc-  
Knight's left. They were all I know of who were present  
on those occasions. I think one day they called a girl  
stenographer. Certain questions were put to me by Mr.  
McKnight and Mr. Kozac and I made certain answers to  
those questions, which were taken down by the stenographer,  
I remember a girl took the notes more than once, took them  
twice. I did not see any translation of those questions  
and answers at any subsequent time. (Marked Government's  
Exhibit 36 for identification.)

183

I know Pierre LeVeque probably eight or ten years. I  
first met him in New York somewhere, though I don't  
remember the exact or approximate spot. I do not know  
the exact date I first became associated with Mr. LeVeque  
in some business endeavor. The best I could say would

*William J. Kleb—For Government—Direct.*

184 be 1935, sometime. I made negotiations with Mr. LeVeque to bring in alcohol for him. Thereafter I brought in alcohol for Mr. LeVeque, in Keansburg, New Jersey. I did not pay the duty on that alcohol. I did not own the alcohol; as near as I can understand, Mr. LeVeque owned it. I wouldn't know if Mr. Erickson had any part in it.

I recall testifying under oath down before United States Commissioner Cotter on or about April 28th of last year. I may remember some of the testimony but not exactly word for word. I do not recall if I was asked questions concerning Nat. Hoffman.

185 The witness was shown pages 80 and 81 of the paper to refresh his recollection.

It refreshes my recollection but I still would not be sure whether I know a man by the name of Hoffman. I have known so many people in my time since I have been working that I would not know any of them any more. I recall the following question being asked by Mr. Dunigan, "You know Bert Erickson, don't you?" and the answer: "Yes, sir".

"Q. You have known him for some time, too? A. Yes.

"Q. You knew, as a matter of fact, that he was associated with LeVeque? A. Yes sir.

"Q. You knew that? A. Yes, sir.

186 "Q. You have talked with my brother from time to time about this case, haven't you? A. Yes, sir.

"Q. You had talked to him about the matter? A. Yes, sir.

"Q. And you knew him in South Carolina when the case was on down there? A. Yes.

"Q. And you knew from your association with LeVeque and Erickson that Nardone was connected with the enterprise in some way? A. Yes."

At that time I answered that way, Mr. Dunigan put the words in my mouth. I would say at this time that my answers there were not true. I was under oath at the time



*William J. Kleb—For Government—Direct.*

I testified in that proceeding and I had time to reflect before I answered questions, nor was there anything particularly involved about that question or the next question:

"Q. And you knew that Hartman was connected with it? A. Yes."

I was also asked "Q. And you were connected with it in one way or another? A. Yes, sir."

My own answer to that question was correct.

Q. And at the top of page 82: "Q. Do you know Hoffman? A. Yes, sir." I must have been asked that question and gave that answer in April of 1938. That was supposed to have been a truthful answer but it was not true. At that time I didn't know him, and don't know him today. I testified falsely on the stand at that time because—maybe I thought it was somebody else. At that time I didn't see nobody's picture, or anything. I know quite a few people but no one by the name Hoffman being associated with LeVeque. I do not know more than one person by the name of Nardone and I stated while I was under oath before the Commissioner that Nardone was connected with LeVeque and Erickson in some way. I do not know if that was a truthful answer. When I was testifying before the Commissioner in 1938 I was in possession of all my faculties and in as good a frame of mind as I am now. The questions were fairly simple.

I have stated that I knew only one person by the name of Nardone. Before Commissioner, Mr. Dunigan said that Nardone was connected with LeVeque and Erickson. Nardone was not connected with LeVeque and Erickson at that time. When I was up before Mr. McKnight on November 10th of last year I was questioned for a considerable period of time and I was in possession of all my mental faculties on that day.

(At this point Mr. Nolan left the courtroom.)



*William J. Kleb—For Government—Direct.*

190 Government's Exhibit 36 for identification refreshed my recollection in connection with the questions Mr. Duni-gan has been asking me but there is a later statement than that that is truer than that. After reading this statement, Government's Exhibit 36 for identification, I am able to state I don't know a man by the name of Frank Nardone or Frank Carmine or Nat Hoffman.

I recall Mr. McKnight asking the following question:

"Q. Well, what is a good place to begin. Let's take 1935. That interests me most in this situation. At that time you had known LeVeque for quite some time," and your answer, "Yes, I knew him quite a good many years."

191 That question and that answer at that time were truth-ful. I met LeVeque in Montreal. We came together on the train.

Q. "Q. At this time you were working with Nardone and Hoffman, weren't you? A. That is right." I may have answered it in that way, yes, sir.

Q. Was your answer a truthful answer? A. No, sir.

Q. But you do recall that question and that answer, is that right? A. Yes, sir.

"Q. They had bought the Ganiff?" A. Who had bought the Ganiff?

192 Q. I am repeating the next question after the one I just read, they had bought the Ganiff in 1935? A. 1935, you say?

Q. Yes. "A. When did we go away, when did we get indicted?"

*"By Mr. Kozac:*

"Q. March, 1936. A. March, 1936, South Carolina indictment."

Q. I will go on with a whole question and answer.

"Q. Starting in the fall of 1935, you joined up with LeVeque? A. Fall of 1935.

*William J. Kleb—For Government—Direct.*

"Q. In New England? A. That is right."

Q. Do you remember those questions and those answers?

A. No, sir, they are all wrong. If they are on that sheet of paper they are wrong, because that is not what I was asked.

Q. Do you remember this question by Mr. McKnight:

"Q. Keansburg. During testifying in removal in 1935 to shooting in Keansburg. A. That is, right. Well, I just got on the train with him and later, I don't know when exactly, he met Nardone."

Do you remember that question and that answer?

Mr. Cahill: Now we have a shooting in Keansburg. The fact that it is in doesn't make it any more important but is more prejudicial to the issues. The defendants are being burdened by things not connected with the defendants.

Mr. Dunigan: As a public official I state in court I intend to connect it and prove it.

Mr. Cahill: I move now for a mistrial. If it is intended to bring that in, if there was such a shooting, they have not been given the opportunity to prepare, and in view of the statement I now move for a mistrial so that we may be given a trial where there is no shooting, and the trial may be strictly within the bounds of this indictment.

The Court: Overruled.

Mr. Cahill: Exception.

"Q. You introduced him to Nardone, didn't you? A. Well, I imagine he knew Nardone before that and I mentioned it probably and he knew about it and we met, where we met, I don't know."

Do you remember that question and that answer? A. All that you just read off there is not what I said in that office.

*William J. Kleb—For Government—Direct.*

196 Q. Do you remember that question and that answer?

A. No, sir, I don't remember anything that isn't true in that statement.

Q. Do you remember this question:

"Q. So LeVeque told you about this Reidun proposition?

A. He didn't name anybody. He never mentioned any other names. I never heard him mention the names of anybody. I did know the merchandise was to come from Europe, from Antwerp." A. That answer is correct. That was truthful in there. The rest was not truthful in there that you read.

"Q. That was the arrangement made between the two outfits at the time LeVeque was working with Erickson?

197 A. That is right."

Do you remember that question and that answer? A. That is truthful.

Q. LeVeque was working with Erickson? A. As far as I know.

Q. I take it for granted they were working together and you had conversations with both LeVeque and Erickson from time to time concerning their directions? A. With Mr. LeVeque.

Q. And you made trips to South Carolina and other places for Mr. LeVeque and Mr. Erickson? A. For Mr. LeVeque.

198 "Q. And you were with Nardone and Hoffman? A. That is right."

Do you remember that question and that answer? A. No, sir.

"Q. What arrangements were made when you combined? A. I think it was just made one combination, one combination." A. Yes, sir.

Q. Do you remember that question and that answer? A. Yes, sir.

Q. Was that a truthful question and answer? A. Yes, sir.

*William J. Kleb—For Government—Direct.*

"Q. What was the combination? A. When we entered the Monololo and brought in the merchandise for that fellow George, when we went up there to get money it belonged to George. St. Pierre was closed and there was no way to get merchandise. I knew Mr. LeVeque and told him I wanted to get merchandise and St. Pierre was closed and there was no way to work. Mr. LeVeque knew me and knew he could trust me and when we came back I brought back the money and told George he should meet Mr. LeVeque and both of them got together. How they got together I don't know, and before I knew it George and LeVeque were working together. I was bringing in the alcohol into Keansburg. I brought it in to Mr. LeVeque. Mr. George—I didn't know where he went. He disappeared as a lot of fellows did in that business." A. I told you that story in your office and I don't like to be made a liar of on the stand. I wish you would have that explained and I would like to get off the stand.

"Q. At that time LeVeque was working with the Isabelle H? A. Yes, sir."

Do you remember that question and that answer? A. That is correct.

Q. LeVeque was working with the Isabelle H? A. Certainly he was.

Q. Your answer to that question was truthful? A. Yes, sir.

"Q. You heard that from LeVeque and Erickson? A. That is right. They called it their off shore boat." A. Yes, sir. I have heard that.

Q. That question was asked you and you made that answer to Mr. McKnight? A. I admit it.

Q. "Q. When the merger took place there must have been some financial arrangement as to who was putting up what and what money was contributed, and that kind of thing.



*William J. Kleb—For Government—Direct.*

202 Can you give me any light on that? A. Well, for my own part, I think I got a percentage and I think I didn't put up any money."

Do you remember that question and that answer?

"Q. You didn't put up any money? A. No, and I was supposed to get a percentage for unloading, taking care of the merchandise."

Do you remember those questions and answers? A. Yes.

Q. And they were truthful? A. Positively.

203 Q. "Q. How much did Nardone put up? A. As far as cash in a deal forming a combination, I wouldn't be able to tell you whether a dollar, five, or ten. I don't know because I don't know what it was worth and I wasn't interested in the combination as to the money, and all that kind of stuff. All I was interested in was my own percentage for unloading, plus whatever the cost was."

Do you remember that question and that answer? A. No, sir—part of it, yes.

Q. What part don't you? A. The part that was interesting to me, my own part in there.

Q. What part don't you recall? A. The part that you say in there whether I knew they put up any money or not.

204 Q. "Q. Whether you were interested or not, you did hear conversations where these sums were being straightened out as to who said what? A. Yes, I heard him say sold so many and the expenses were so much, and profits so much and losses so much."

Do you remember that question and answer? A. Yes, sir.

Q. "Q. When you gathered around, Erickson and LeVeque, Nardone, Hoffman, were all present talking this over? A. That is right."

Do you remember that question and that answer? A. No, sir.



*William J. Kleb—For Government—Direct,*

Q. Do you deny that you made that answer? A. I do, 205  
sir.

Q. Do you know a man named Leo Murphy? A. No, sir.

Q. Stand up, Mr. Murphy—do you know this man?

(A person stood up in the courtroom.)

A. Never saw him before.

Q. Is your eyesight good? A. Just as good as yours,  
sir.

Q. Have you ever been around the Hotel Astor, Mr.  
Kleb? A. I have.

Q. Do you recall the first time when you went to the  
Hotel Astor? A. I only went to the Hotel Astor once or 206  
twice.

Q. When was that? A. I wouldn't know exactly.

Q. Can you fix the year? A. No, I cannot; it has been  
so long ago.

Q. Is it your best recollection that it was one, two, three  
or four years ago? A. Probably four years ago.

Q. That would be 1935? A. 1934 or 1935.

Q. Did you ever meet LeVeque there? A. Yes, sir.

Q. Did you have conversations with him? A. Yes, sir.

Q. What was the conversation about? A. In regard to  
bringing him alcohol.

Q. What did you say? A. I told him what I could do 207  
and he told me to go ahead and do it.

Q. Did you see Erickson there? A. No, sir.

Q. Did you ever see Erickson in the Hotel Astor? A.  
No, sir.

Q. Was Nardone there? A. No, sir.

Q. Was Hoffman there? A. I only seen Mr. LeVeque  
there.

Q. Do you know the telephone operator at the Hotel  
Astor? A. I don't know her name; I know her by seeing her.

Q. If I told you her name was or she was known as  
Stevie, would that help you? A. Yes, sir, that is correct.

*William J. Kleb—For Government—Direct.*

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Q. Stevie? A. Yes, sir.

Q. You stated a while ago that you brought some alcohol into Keansburg, New Jersey, is that right? A. Yes, sir.

Q. What boat did you bring the alcohol into Keansburg on? A. I didn't bring it in, I made arrangements to have it brought in.

Mr. Cahill: Hearsay of that character makes it evident that whatever arrangements he made he could testify to the arrangements, but it would not be relevant here.

Mr. Dunigan: I was about to ask that.

209

Q. What person did you make the arrangements with to bring the alcohol into Keansburg, whom did you talk to concerning the bringing in of the alcohol? A. If I should tell you that it would incriminate him, wouldn't it?

Q. Well— A. It would not?

Q. My question is what person did you talk to about bringing the alcohol in; was it Mr. LeVeque? A. In New York, yes, sir. I thought you meant Keansburg.

Q. Mr. Erickson? A. No, sir.

Q. How many times do you know that alcohol was brought into Keansburg?

210

Mr. Cahill: If the Court please, I have no knowledge nor do I suppose any of us have as to that, and it would make no difference. Whatever was done there is wholly irrelevant.

The Court: Overruled.

Mr. Cahill: Exception.

Q. Do you know how many times alcohol was brought into Keansburg? A. At least twice.

Q. And that was in 1935, wasn't it? A. I wouldn't know the date exactly.

*William J. Kleb—For Government—Direct.*

Q. But it was 1935? A. I imagine it was, yes, sir. 21

Mr. Cahill: One fact more—that is prior to the alleged date of the beginning of this conspiracy.

Mr. Dunigan: We allege it began on the 2nd day of January, 1935.

Q. Were you present in Keansburg on either one of those two occasions? A. Yes, sir, on both occasions.

Q. Do you know how much was brought in each time?

A. Yes, sir, approximately.

Q. What is your approximate guess? A. Approximately 400 and 375. 21

Q. So that you brought in approximately 775 cases? A. Yes, sir.

Q. How much was in each case? A. Six gallons.

Q. Were the cases similar to this case, Government's Exhibit 32 for identification?

Mr. Cahill: I object to that. That isn't connected with this case.

The Court: Objection overruled.

Mr. Cahill: Exception. We take an exception but your Honor will understand the improbability of making motions at the close of the case. 21

The Court: What is improbable about that?

Mr. Cahill: No matter how appropriate the notes, I cannot note all irrelevant evidence.

Mr. Dunigan: I say I propose to connect all of this.

"Q. Were the cases similar to this case, Government's Exhibit 32 for identification?" A. They were wooden cases like that, yes, sir.

Q. About the same size? A. Yes, sir.

*William J. Kleb—For Government—Direct.*

214 Q. What boat did you bring the alcohol into Keansburg on? A. On the Pronto.

Q. Do you know who owned the Pronto? A. Yes, sir.

Q. Who did own it? A. Mr. LeVeque.

Q. Was he the sole owner? A. As far as I am concerned he was the man who bought it and paid for it, and so on.

Q. Did you ever see Erickson on the pier at Keansburg the night you were there? A. He was there when I was there, yes, sir.

Q. That was about October 2, 1935, wasn't it? A. I told you before I wouldn't know the date.

215 Q. Did you have a conversation with Erickson at the time you saw him on the pier at Keansburg? A. I don't remember any conversation.

Q. Can you fix the date of that, Mr. Kleb, at the time when you were on the pier at Keansburg? A. No, I would not be able to fix the date. I don't remember any dates very clearly.

Q. Do you remember when the Pronto was rammed by the Coast Guard? A. I remember it, yes, sir.

Q. Where did that occur, do you know? A. About 65 miles south of Montauk.

Q. Do you remember the date of that? A. No, I don't.

216 Q. What is your best guess as to the date? A. I wouldn't remember.

Q. I show you Government's Exhibit 26 for identification, and ask you to examine the date on there, which appears to be October 12, 1935; would that refresh your recollection as to the date or approximate date when the Pronto was rammed? A. October 12?

Q. Yes. A. This here had been soon afterwards, after the thing had been rammed.

Q. This is addressed to you at Middletown, Connecticut, is that right? A. Yes, sir.

*William J. Kleb—For Government—Direct.*

Q. What about these three drafts, one for 100, 200 and 500, part of Government's Exhibit 26 for identification; do you know anything about this? A. I received this money in Connecticut. 217

Q. Do you know who sent it to you? A. No, sir.

Q. Had you made any request for money? A. Yes, sir.

Q. What person did you request money from? A. From Mr. LeVeque.

Q. And after you made the request you subsequently received this money, is that right? A. That is correct.

Q. Those three drafts have your endorsement on the back of them, do they not? A. Yes, sir.

Q. What did you request money from Mr. LeVeque for? A. For repairs. 218

Q. On what? A. On the Pronto.

Q. After it had been rammed, is that right? A. Yes, sir.

Q. How long after you received this money represented by Government's Exhibit 26 for identification before the Pronto left? A. I believe it left in a few days after or a week at most.

Q. So it would have been some time in October when the Pronto was repaired and left? A. Yes, sir.

Q. Where did the repairing take place? A. The East Coast Shipyard.

Q. That would be in Connecticut? A. In Norwalk. 219

Q. Do you know this gentleman who testified? A. I spoke to him once.

Q. Concerning the Pronto? A. I just met him in the yard while he was there. I knew he was the boss.

Q. Did you have anything to do with signing the contract for the repairing of the boat? A. No, sir.

Q. Who did sign the contract for the repairing of the boat? A. Harold Conrad.

Q. How long was it after the Pronto left New London and before you were down at Keansburg, or let me ask you this question, do you know where the Pronto went after it left New London? A. It went to sea.



*William J. Kleb—For Government—Direct.*

220 Q. Were you on it? A. No.  
Q. Do you know when it left? A. No, not for a week or so, anyhow.

Q. Where did you go after you left New London? A. I went home.

Q. Where is that? A. To Long Island.

Q. Were you at Montreal shortly after the Pronto was being repaired at New London? A. No, sir.

Q. Were you up in Yarmouth, Nova Scotia, shortly after you left New London? A. That is correct.

Q. Have you ever used any name other than the name Bill Kleb or William Kleb? A. Yes, sir.

221 Q. What name or names have you used? A. Yes, sir, in Nova Scotia I used the name Walter Adams.

Q. Have you ever used other names? A. No, sir.

Q. Have you ever used the name Bert Shields? A. Yes, sir, that was very many years ago.

Q. Have you used the name Bill Baker? A. No, sir.

Q. Look at that paper, Government's Exhibit 16 for identification; what do you know about that particular paper? A. That I collected money.

Q. And that is addressed to you at Yarmouth under the name of Walter Adams, is that correct? A. Yes, sir.

Q. How much is that draft? A. \$1050.

222 Mr. Cahill: I object to asking questions that have no relevancy to the issue.

Mr. Dunigan: I withdraw that question.

Q. Do you know who sent you that money? A. No, sir.

Q. Did you request money? A. Yes, sir.

Q. What person did you request money from? A. From Mr. LeVeque,

Q. Shortly after you made the request did it come? A. It always came.

*William J. Kleb—For Government—Direct.*

Mr. Dunigan: I offer in evidence Government's Exhibit 16 as well as Government's Exhibit 26. 22

The Court: What number is this?

Mr. Dunigan: 16, your Honor.

Mr. Cahill: I object on the grounds heretofore stated, particularly that they are immaterial and irrelevant.

The Court: Overruled.

Mr. Cahill: Exception.

(Government's Exhibits 16 and 26 for identification received in evidence.)

Q. What was this \$1050 represented by Government's Exhibit 16 in evidence used for? 22

Mr. Cahill: I object to that question as immaterial and irrelevant.

The Court: Overruled.

Mr. Cahill: Exception.

A. I wouldn't know exactly unless it was for crew's wages or a particular bill or fuel bill or something like that for the expense of the Pronto.

Q. And in any event it was to be used in one way or another for the Pronto? A. That is right. 22

Q. What were you doing in Yarmouth on November 19, 1935? A. I was taking care of the vessel.

Q. Did you get any alcohol up there? A. No, sir.

Q. How long did the Pronto remain in Yarmouth? A. As to exact dates I wouldn't know, whether it was a week or more. Generally it would stay in a week.

Q. So that that is some time approximately a week after November 14? A. If there was nothing the matter with it.

Q. When were you down at Keansburg? A. After this.

*William J. Kleb—For Government—Direct.*

226, Q. So that it was sometime in November, 1935, that you were down at Keansburg? A. I imagine it was.

Q. Have you any knowledge as to the exact date? A. No, I don't know, I was going here and there.

Q. You were in a lot of places? A. Yes.

Q. If I told you you were in Keansburg on November 22, would that be about right? A. Yes, sir.

Mr. Cahill: I object to that. If he asks him was that the correct date, that might be a proper question.

227 Q. Would November 22 be about right? A. It would be about right, yes, sir.

Q. Did you bring in any alcohol at that time? A. Yes, sir.

Q. That is one of the times you previously referred to? A. Yes, sir.

Q. Do you know who was on the Pronto at the time it appeared at Keansburg?

Mr. Cahill: I object to that.  
(Question withdrawn.)

228 Q. Was Captain Conrad on the Pronto at the time it appeared at Keansburg?

Mr. Cahill: I object to that question.

The Court: Overruled.

Mr. Cahill: Exception.

A. (No response.)

Q. Do you know a man named Captain Lancaster?

Mr. Cahill: Objected to on the same ground.

The Court: Overruled.

Mr. Cahill: Exception.

*William J. Kleb—For Government—Direct.*

Q. (Continued) And was he on it? A. He may have been and I might not know it.

Q. Had you arranged for the Pronto to leave Yarmouth?

A. Yes, sir.

Q. Don't you know who the members of the crew were?

A. You knew when they were there and when you were there. They were all drunk. They were liable to be pulled out—two or three different ones. He may have been on there. I wouldn't say he was not on there.

Q. How about Van Austen, was he on it? A. Yes.

Q. You went down to Keansburg to supervise the unloading, is that right? A. Yes, sir.

Q. Did you go down with Erickson? A. I don't remember if I did or not.

Q. Did you see Erickson around the pier at Keansburg?

A. Yes, sir.

Q. He was there? A. Yes, sir.

Q. What happened at Keansburg that night?

Mr. Cahill: I object as immaterial and irrelevant and not within the issues.

The Court: What are the issues?

Mr. Cahill: There is a definite conspiracy about bringing alcohol in.

The Court: What makes you say it was brought in at Keansburg is not within the issues?

Mr. Cahill: The Keansburg incident is not connected with any defendant.

The Court: Overruled.

Mr. Cahill: Exception.

(Question repeated as follows):

"Q. What happened at Keansburg that night?" Before you answer that question may I ask you if Red Saunders was there? A. I couldn't answer that, I don't know, I am not positive whether he was there or not. He may have been there but I am not sure.

*William J. Kleb—For Government—Direct.*

232 Q. Did you notice any other person that you did not know around the pier that night? A. Yes, sir.

Q. Tell us what happened down at the pier with respect to the Pronto and the unloading, and so on. A. The Pronto came in and we unloaded the merchandise and after we got the merchandise off, the boat went out again and two or three of us left the dock—in fact I myself with Van Austen left the dock and we went about ten blocks away from the dock and he went in my car that was there because I was dead tired. I started to walk back on the dock and heard shots. When I heard shots I didn't go back to the dock. I just got in my car and went home.

233 Q. Was all the alcohol unloaded from the boat at that time? A. Everything was unloaded, yes, sir. I believe before the shots were fired one truckload went away.

Q. There were truckmen there ready to get it, is that right? A. I had to go and call the truckman. He was in the neighborhood. He was not there waiting for it.

Q. Were you molested in any way with respect to the alcohol and its removal or did you have a free hand? A. Up until that time I had a free hand. I don't know what took place. When I left everything was fine, everything worked on schedule, but on my way back I heard these shots so I didn't go back to the dock.

234 Q. Did you see Erickson the next day? A. I don't remember if I did or not.

Q. Did you see him after that at any time? A. Yes, I did.

Q. Approximately when thereafter? A. In December some time.

Q. Did you have any conversation at that meeting with respect to what happened at Keansburg? A. No, I did not.

Q. Did you have any conversation with LeVeque concerning that subject? A. No, other than I knew what happened down there.



*William J. Kleb—For Government—Direct.*

Q. Did you tell him? A. I told him I heard shots and left.

Q. Did you talk with Van Austen on that subject? A. Van Austen heard the shots the same as I did. He was asleep in the car. He said, "What's the matter?" I said there was some shooting going on, and we left.

Q. How many shots were fired? A. Two or three.

Q. There were sufficient to wake Van Austen up even though he was asleep? A. Well, he was dog tired.

*By the Court:*

Q. I thought you said you had ridden ten blocks away?

A. I walked ten blocks away.

Q. And Van Austen was awakened ten blocks away?

A. Well—

Q. He was ten blocks away? A. I went back in the car.

Q. I thought you said you went back to the dock? A. I was on my way to the dock, within a block or two, when I heard shots.

(Adjourned to March 14, 1939, at 11:15 A. M.)

New York, March 14, 1939;  
11:15 A.M.

TRIAL RESUMED.

WILLIAM J. KLEB, resumed the stand.

*Direct examination (continued) by Mr. Dunigan:*

Q. Mr. Kleb, I believe yesterday afternoon we were discussing the Keansburg incident, is that right? A. Yes, sir.

Q. Did you see Red Saunders on the pier at Keansburg on November 22nd? A. I did not.

*William J. Kleb—For Government—Direct.*

238 Q. What persons did you see other than Erickson?

Mr. Cahill: The same objection is made to these questions as made yesterday, on the ground they are not connected in any way with the defendants, and immaterial and irrelevant.

The Court: Overruled.

Mr. Cahill: Exception.

A. There were about a dozen men on the dock that I had not seen before.

Q. You saw Van Austen there? A. Yes, sir.

239 Q. Who else did you see besides Erickson and Van Austen? A. I seen the crew when they came with the boat.

Q. Did you see Conrad? A. Yes, sir.

Q. You know Conrad, don't you? A. I do.

Q. Who else did you see? A. Just these other men. I wouldn't be able to say who they were, they were doing the unloading.

Q. Do you know their names? A. No, I don't.

Q. Where did you go after November 22nd when the Pronto was at Keansburg? A. Directly after?

Q. Yes. A. Do you mean the night of the 22nd—where did I go in the morning?

240 Q. Yes. A. Probably went home.

Q. Did you see LeVeque the next day? A. I might have, I am not positive.

Q. What is your recollection? A. I might have.

Q. Did you or didn't you? A. I don't remember because it has been so long ago.

Q. Did you see Erickson the next day? A. That goes the same thing, I don't know that.

Q. Did you have any talks with either LeVeque or Erickson concerning Keansburg? A. I did, yes, with Mr. LeVeque.

Q. What did you say? A. I just told him about losing the merchandise down there.

*William J. Kleb—For Government—Direct.*

Q. What did you say? A. Didn't say anything other 241  
than it was lost.

Q. There came a time when you were at Yarmouth? A.  
Yes.

Q. Was the Pronto there? A. Yes.

Q. There was some repair work to be done on the Pronto?  
A. Yes, sir.

Q. What was that trouble? A. Motor trouble.

Q. Do you know the exact nature of that trouble? A.  
I believe it had something wrong with the head and the  
pistons in the motor.

Q. You ordered some parts for it? A. Yes.

Q. Tell us about that. A. I called up from Yarmouth to 242  
the Diesel Company.

Q. In New York? A. Yes, and whatever was necessary  
I ordered. I believe it was either the head or the pistons.  
They wanted to know where to get paid. I told them they  
would get paid in New York. I told them to call up the  
Hotel Astor and to get in touch with a man by the name of  
Mr. Durant.

Q. Who was Durant? A. Mr. LeVeque.

Q. Did you receive the motor parts? A. Yes, sir.

Q. At Yarmouth? A. Yes, sir.

Q. How were they sent up? A. I believe I told them to  
put them on an airplane and send them to Boston and then 243  
by steamer or plane.

Q. Do you know what person they were addressed to?  
A. No, I don't remember.

(Marked Government's Exhibit 37 for identifica-  
tion.)

Q. I show you Government's Exhibit 37 for identifica-  
tion and ask you if that will refresh your recollection with  
respect to the parts that were ordered. A. I ordered parts  
twice I believe. This is the first order.

*William J. Kleb—For Government—Direct.*

244 Q. Looking at Government's Exhibit 37 for identification, does that refresh your recollection with respect to the date when you ordered these parts? A. Yes, sir.

Q. What is the date when you did order the parts? A. January 8, 1936.

Q. Do you recall being in Yarmouth on or about December 16, 1935? A. I may have been.

Q. Weren't you up there before Christmas in 1935? A. I may have been, I am not so positive.

Q. Do you recall using the name Walter Adams at Yarmouth? A. Yes, sir.

Q. And you received money there under that name?  
245 A. Yes, sir.

Q. Had you made requests for money? A. At what time?

Q. In December, 1935? A. If I was in Yarmouth I did.

Q. From whom did you request money? A. From Mr. LeVeque.

Q. Is he the only one from whom you asked for money?  
A. He is.

Q. Did you request money at any time from Erickson?  
A. Never.

Q. And after you did request money from LeVeque you received it? A. Yes, sir.

Q. Through Western Union? A. Yes, sir.

246 Q. And it was sent to you under the name of Walter Adams? A. Yes, sir.

Q. Do you recall going down to South Carolina? A. I do.

Q. Do you recall when that was? A. Before Christmas.

Q. In 1935? A. Yes.

Q. What was the occasion of your going to South Carolina, what was the reason? A. To make arrangements to bring in merchandise.

Q. When you say merchandise do you mean alcohol?  
A. Yes, sir.

*William J. Kleb—For Government—Direct.*

Q. Your trip to South Carolina was after the Keansburg affair? A. Yes, sir. 247

Q. And your reason for going to South Carolina was because of what happened at Keansburg, is that right?

Mr. Cahill: I object to the leading of the witness and to the form of the question.

The Court: I will allow it.

Mr. Cahill: Exception.

A. I wouldn't know whether that was the reason or not.

Q. Did you have any conversations with Mr. LeVeque or Mr. Erickson about South Carolina? A. I had conversations with Mr. LeVeque. 248

Q. Is he the only one you talked to on that point? A. Yes, sir.

Q. What conversations did you have with Mr. LeVeque about South Carolina?

Mr. Cahill: We object to that as immaterial and irrelevant and to all the questions about relations with persons not on trial and not connected with it.

The Court: Overruled.

Mr. Cahill: Exception.

A. I said we were having trouble to bring in the merchandise and I had a friend who knew how to bring in merchandise in South Carolina. 249

Q. What was that man's name? A. Scarborough.

Q. His first name? A. Archie Scarborough.

Q. Is this Archie Scarborough or a picture of him (indicating)? A. Yes, sir.

(Marked Government's Exhibit 38 for identification.)



*William J. Kleb—For Government—Direct.*

250 Q. Was Archie Scarborough in South Carolina? A. No, he was in Bayshore.

Q. He had been in South Carolina? A. Yes, sir.

Q. Do you know the position he had there? A. He worked for the Government in some survey.

Q. He was in the Coast Survey, wasn't he?

Mr. Cahill: We object to that.

(Question withdrawn.)

Q. What did you say Archie Scarborough's job was? A. The Government and for the Geodetic Survey.

251 Q. Where did you go when you went to South Carolina, what town or city? A. I went to Georgetown.

Q. Did you meet Scarborough there? A. No, I took Scarborough along with me.

Q. Who else went along? A. I went down with Mr. Erickson in his car.

Q. Anyone else? A. I don't remember.

Q. How about Red Saunders, did he go along? A. No, sir.

Q. Did you see Red Saunders in South Carolina? A. Not at that time.

Q. Did you see him at any subsequent time? A. Later.

252 Q. What did you do in South Carolina with respect to bringing in merchandise as you said? A. I made arrangements with some people down there so that we would safely be able to get the stuff in.

Q. Was that after the Pronto and the Isabelle H had been up to Yarmouth? A. The Pronto just came from Yarmouth.

Q. And the Isabelle H was also in Yarmouth, wasn't it? A. I believe so.

Q. Don't you know? A. I was not on the boat to know exactly.

*William J. Kleb—For Government—Direct.*

Q. You know the Isabelle H, don't you? A. I do.

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Q. Whose boat was that, if you know? A. I wouldn't know exactly other than hearsay.

Q. Did you talk to Mr. LeVeque or Mr. Erickson about the Isabelle H? A. May have talked to Mr. LeVeque.

Q. Did you? A. Yes.

Q. What conversations did you have in regard to the Isabelle H? A. He just told me to go out and meet the boat, the Isabelle H. That is all the conversation I had.

Q. Did you talk about trips to be made by the Isabelle H and the Pronto? A. At this time?

Q. Yes. A. I did.

Q. What conversations did you have on that subject? A. He just told me he was satisfied to work down there and to go ahead and make arrangements.

254

Q. Did he tell you the Isabelle H and the Pronto were going south? A. Yes.

Q. And preparations were made to land the cargo in South Carolina, is that right? A. Yes.

Q. You made more than one trip, too? A. Yes, sir.

Q. You made more than one trip to South Carolina, didn't you? A. I did.

Q. Do you recall when the first trip was made? A. Before Christmas.

Q. In December of 1935? A. That is right.

255

Q. Was that the time when you made arrangements to land the cargo? A. Yes, sir.

Q. When did you make the next trip? A. When the boat was caught down there, whatever that date was or around that date.

Q. Was that after Christmas? A. I believe it was.

Q. In January of 1936? A. Yes.

Q. Did Saunders go along on that particular trip? A. He did.

Q. Who else went along, if you know? A. Mr. Scarborough.

*William J. Kleb—For Government—Direct.*

256 Q. Is that all? A. That is all I can remember.

Q. When you were in South Carolina on this second trip did you communicate with LeVeque in any way? A. Yes, sir.

Q. How did you communicate with him? A. I called him on the telephone.

Q. Did you send a telegram to him? A. No, sir.

Q. Did anyone else, to your knowledge?

Mr. Cahill: The same motion made with respect to the defendant Geiger is renewed to this testimony. I shall not repeat it in detail. It would be encumbering the record and is fully before your Honor.

The Court: Objection overruled.

Mr. Cahill: Exception.

A. I believe Mr. Saunders sent a telegram.

Q. Did he? A. Yes.

Q. Did he write that out in your presence? A. I don't remember that.

Q. I show you this paper and ask you to examine it and state whether it refreshes your recollection with respect to the last question. A. Yes, sir.

258 Mr. Dunigan: Mark this Exhibit 39 for identification.

(Marked Government's Exhibit 39 for identification.)

Q. Saunders was also known as Jack, was he not? A. I think so.

Q. Was he? A. At that particular time, yes.

Q. Now after examining this piece of paper, Government's Exhibit 39 for identification, did you see Saunders write that? A. No, sir, unless standing outside in front of the Western Union had anything to do with it.

*William J. Kleb—For Government—Direct.*

Q. Have you seen Saunders write? A. No, sir.

Q. You don't recognize his handwriting? A. No, sir.

Q. You are not able to state whether the handwriting on Government's Exhibit 39 for identification is Saunders' handwriting? A. Can I see it again?

Q. Yes (handing paper to witness). A. That is my own handwriting.

Q. That is your handwriting? A. That is right.

Q. And you wrote out Government's Exhibit 39 or the original of this? A. That is right.

Q. Isn't the name Jack signed to it? A. That is right.

Q. What is the writing on the lower left in the corner?  
A. Hughes in hotel.

Q. What is the name Hughes, what does that mean? A. I didn't write that, I don't know what that is.

Q. What hotel did you stay at in South Carolina? A. In the Francis Marian Hotel.

Q. Was that in Georgetown? A. It is in Charleston.

Mr. Dunigan: I offer this photostat in evidence.

Mr. Cahill: We object to the admission of it, not connected with the act of any defendant in this case, and as immaterial and irrelevant.

The Court: Objection overruled.

Mr. Cahill: Exception.

(Government's Exhibit 39 for identification received in evidence.)

Q. What is meant by Alamo Down, on Government's Exhibit 39 in evidence?

Mr. Cahill: We object to that question. No matter what interpretation the witness may place on it, not being in any way connected with any defendants, and is clearly incompetent and irrelevant.

*William J. Kleb—For Government—Direct.*

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The Court: Overruled.

Mr. Cahill: Exception.

A. I don't know what that means.

Q. What does Saturday, 11 A. M., Saturday, 7 P. M. mean?

Mr. Cahill: Same objection to all this line and an exception.

Q. Perhaps the date on that would help you some. A. Definitely I wouldn't know what it was.

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Q. Did it by chance have anything to do with the Pronto?

A. It did have something to do with the Pronto.

Q. What did it have to do? A. In regard to having the boats come in.

Q. Into South Carolina? A. That is correct.

Q. You will notice that that telegram or the photostat you hold in your hand is addressed to a person named George Woodrow, is that right? A. Yes, sir.

Q. Who is that? A. Mr. LeVeque.

Q. And where was he in New York when you sent this, what particular hotel? A. In the Piccadilly Hotel.

264

Q. Do you remember what room he had in the Piccadilly Hotel? A. No, I don't.

Q. Would you recollect the room number if you heard it? A. No, sir.

Q. Had you visited LeVeque in the Piccadilly Hotel? A. No, sir.

Q. Do you know how long he stayed there? A. No, I do not.

Q. You told us yesterday, Mr. Kleb, that you knew a person by the name of Nardone, is that right? A. I told you yesterday I knew a person of that name?

Q. Yes. A. I didn't tell you that.



*William J. Kleb—For Government—Direct.*

Q. Didn't you say yesterday you only knew one person by the name of Nardone? A. No, sir.

Q. Do you know a person by the name of Nardone? A. Mr. Dunigan, yesterday when you started to question me—

Q. Answer the question, do you know a person by the name of Nardone? A. I will still say I don't know a person by the name of Nardone. If I knew what was in your mind I might answer you. If you will tell me when I was supposed to know Nardone I might tell you.

Q. 1935? A. No, sir.

Q. 1936? A. I met a man who may have been Mr. Nardone. I would like to explain it.

Q. Go ahead and make your explanation. A. When I was arrested in this case, there was a string of defendants a mile long. In the lawyer's office there may have been a man there by the name of Nardone and I might have known that man, but yesterday when you shouted at me did I know a man by the name of Nardone I couldn't answer.

Q. Haven't you had time to reflect on that since yesterday? A. Yes, sir—I have been sick since yesterday.

Q. Now, do you know a man named Nardone? A. In the latter part of 1936 I knew a man named Nardone.

Q. Where? A. In a lawyer's office.

Q. In the latter part of 1936? A. Yes, sir.

Q. Have you ever been in 165 Mott Street, New York? A. No, sir.

Q. Did you tell Mr. McKnight you had been there? A. No, sir.

Q. What did you say in your second statement? A. I was in Mr. McKnight's office three weeks. It was not a statement. I was talking to Mr. Kozak and Mr. McKnight in regard to this case and Mr. McKnight told Mr. Kozak to make a trial brief.

Q. Did Mr. Kozak make a trial brief? A. Yes, sir.

*William J. Kleb—For Government—Direct.*

- 268 Q. In your presence? A. Yes, sir.  
 Q. Dictated it in your presence to the stenographer? A.  
 Yes, sir.  
 Q. Did you make corrections in that trial brief? A.  
 Yes, sir.  
 Q. Did Mr. Kozak dictate to the girl the amended trial  
 brief in your presence? A. That is right.  
 Q. I show you this paper headed William Kleb and ask  
 you to examine it and state whether or not that is the trial  
 brief that you refer to.

269 Mr. Cahill: We object to the introduction of the  
 trial brief by counsel.

Mr. Dunigan: I haven't offered it yet.

Mr. Cahill: We object to questions about it as  
 irrelevant and immaterial. If I am required to object  
 to every question I will do it, but it would delay  
 the trial, and I have stated I will object to this man's  
 whole line of testimony, his dealing with LeVeque  
 and other persons not on trial. If I am required to  
 object I will do it, if I think there is any objection  
 I will indicate it. Exception.

The Court: To what?

270 The Witness: In this statement it is practically  
 all true other than it says here I returned to the  
 United States and it was then decided by LeVeque,  
 Erickson, Nardone and Hoffman about different  
 things. At no time, to my recollection, have I ever  
 met Mr. Nardone or Mr. Hoffman with Mr. LeVeque  
 to discuss any business.

Q. Did you meet him not with Mr. LeVeque? A. I  
 never met Mr. Nardone or Mr. Hoffman until after this  
 indictment, after I was a defendant, as a defendant in a  
 lawyer's office. I never knew them before that, and in

*William J. Kleb—For Government—Direct.*

this testimony here, whenever it is mentioned I said that Mr. Nardone and Mr. Hoffman and Mr. Erickson and I were at meetings stating business, it is very incorrect.

Q. You stated that was dictated in your presence? A. I did.

Q. Did you complain to Mr. Kozak or Mr. McKnight that it was not true? A. I certainly did.

Q. What ~~did~~ they do? A. They said okay, and I was under the belief none of that stuff was in that brief.

Q. Did Mr. Kozak and Mr. McKnight go ahead and dictate despite your objection? A. No, sir.

Mr. Cahill: I object to that.

The Court: Overruled:

Mr. Cahill: Exception.

Q. When did you first meet Erickson? A. In 1935, I believe.

Q. Do you recall this question being put to you by Mr. McKnight:

"Q. How long had you known Erickson in 1935? A. Just at that time."

A. That is just what I said, around 1935.

Q. And that was a truthful answer? A. That is right.

Q. The first time you met him? A. Never knew him before.

Q. And that is correct? A. Yes, sir, I just told you that.

Q. "Q. How long had you known Nardone? A. Never knew him before. When I first started with him, that might have been three, four months before this here."

Do you remember that question and that answer? A. I was there so many times that I wouldn't know what was right in regard to these two gentlemen, Mr. Nardone and Mr. Hoffman.

*William J. Kleb—For Government—Direct.*

274 Q. Do you recall that question? A. No, I do not.

Q. "Q. Before you met LeVeque in connection with this combination? A. I never knew him before."

Do you recall that question and that answer? A. No, sir.

Q. "Q. How about Hoffman? A. I never knew him until later than that even, about two months before that."

Do you recall that question and answer? A. No, sir.

Q. "Q. How did you happen to join up with Nardone and Hoffman, through Ferrari? A. No."

Do you recall that question and answer? A. No, sir, I do not.

275 Q. "Q. How did you happen to join up with them? A. Somebody took me to Mott Street. I don't know who it was now. Fellow, I think, by the name of Friedman, a little Jewish fellow by the name of Friedman. He knew these fellows and knew they were working."

Q. You have never been on Mott Street? A. No, sir.

Q. Never in your life? A. I have been to Mott Street plenty of times.

Q. And you have been to 165 Mott Street, have you not?

A. No, sir, I have not.

Q. Do you recall this question and this answer:

276 "Q. Nardone and Hoffman? A. Yes. I don't know, wait a minute, no, it wasn't Friedman. It was a fellow that owned some casino up here in 41st Street. I know about the casino in 41st Street but that is all I know of the question."

Do you recall that question being put to you by Mr. McKnight and your answer? A. In three weeks' time they put thousands of questions to me. I don't remember them all.

Q. Do you remember that? A. No, I don't remember that.

(Recess to 2:00 P. M.)

William J. Kleb—For Government—Direct.

AFTERNOON SESSION.

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WILLIAM J. KLEB, resumed the stand.

*Direct examination (continued) by Mr. Dunigan:*

Q. Mr. Kleb, you told us that when you were up at Yarmouth you used the name Walter Adams. A. That is right.

Q. I show you Government's Exhibits 6, 5, 14, 12 and 7 for identification, and ask you if you recognize those papers.

A. I do that (indicating Government's Exhibit 6 for identification); I don't know that—that is my name on there but I don't remember getting that. 278

Mr. Cahill: What about that? I didn't hear it. As to Exhibit 6, I didn't understand that this goes with the check.

The Witness: The signature on the check is mine.

Q. What about 5? A. That is the same, that is mine, Walter Adams, yes.

Q. Do you recognize this one, Government's Exhibit 14?

A. Yes, sir. 279

Q. The signature on the draft is your signature? A. Yes, sir.

Q. What about the others that you have? A. These are all okay checks but I don't understand this here. There is nothing on there that I wrote.

Q. What about the other one you have? A. Yes, sir.

Q. You recognize the signature on the drafts in Government's Exhibits 7, 12, 6, 5 and 14 for identification, is that right? A. Yes, sir.



*William J. Kleb—For Government—Direct.*

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Mr. Dunigan: I offer them in evidence.

Mr. Cahill: Objection is made to the reception of these documents on the ground that they appear on the record not to be relevant and I call your Honor's attention to the name signed to these documents such as Friedman, Rosen, about which there has been no testimony. I did hear the name Friedman once.

Mr. Dunigan: I withdraw the offer.

Q. You told us you ordered parts from the Atlas Diesel Corporation on two occasions? A. Yes, sir.

281 Q. And you identified Government's Exhibit 37 as containing parts that you ordered, is that right? A. Yes, sir.

(Paper marked Government's Exhibit 40 for identification.)

Q. Look at Government's Exhibit 40 for identification and state whether or not you recognize any of the parts mentioned on that particular exhibit. A. Yes, sir.

Q. Did you order those parts from the Atlas Diesel Corporation? A. Yes, sir.

Q. And received them in Yarmouth? A. Yes, sir.

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Mr. Cahill: May it please the Court, we move to strike out all of the testimony of this witness, not only on the ground of irrelevancy and immateriality, but for failure to connect it with the defendants or any defendant in this case, and also on the ground as to the motion with respect to the testimony of Geiger and we repeat the offer of proof that we made in connection with the testimony of Geiger.

The Court: Motion denied.

Exception to all defendants.

*William J. Kleb—For Government—Cross—Redirect.  
Ann Wald—For Government—Direct.*

*Cross-examination by Mr. Cahill:*

I was interrogated by representatives of the Government about this case about three weeks ago, I believe.

*By Defendant Brown:*

I have seen Mr. Brown once before in the House of Detention. I know LeVeque to be a bootlegger, interested in rum running since 1921. I do not know whether he owned or had an interest in a boat about 1929 and 1930 by the name Doctor. I heard that he had an interest in a boat named after his daughter Beatrice L, in 1931 and 1932, but there was no way to prove it. I do not know who was captain of that boat nor do I know Fred Velez.

*By Mr. Dunigan:*

I was taken by you before a judge last April in regard to Mr. LeVeque in some way or other, a hearing of something, is that what you mean, and Mr. Dunigan questioned me some time last year when this matter was being presented to the Grand Jury when Van Austen was here.

(Witness excused.)

ANN WALD, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

I am presently occupied as a housewife. In December, 1935 I was employed as a telegraph operator for the Western Union at the Astor Hotel, 44th Street and Broad-

*Ann Wald—For Government—Direct.*

28 In December I had a conversation with Mr. Dunn, and shortly after that someone submitted a telegram application. Government's Exhibit 10 marked for identification was the money order submitted to me at that time. I wrote it out upon request of the customer at that time. Pierre LeVeque, whom I know, instructed me to fill that out. Mr. LeVeque's companion paid me the money for it. I do not know who that companion was.

Government's Exhibit 41 for identification is Pierre LeVeque.

287 (Government's Exhibit 41 for identification received in evidence.)

Government's Exhibit 10 for identification is the money order application for \$2,300 and it is addressed to Harry Ducose, Halifax, Nova Scotia. Harry Rosen signed the application.

(Government's Exhibit 10 for identification received in evidence.)

Mr. Dunn spoke to me in connection with Government's Exhibit 10 in evidence.

288 Government's Exhibit 13 for identification is a telegram that was presented to me by Mr. LeVeque and he requested me to write out. It is in my handwriting.

(Government's Exhibit 13 for identification received in evidence.)

It is addressed to Harold Wright in care of Jack Baker, Yarmouth, Nova Scotia. There is no signature.

(Witness excused.)

*Loretta Crowley—For Government—Direct.*

LORETTA CROWLEY, called as a witness on behalf of the Government, having been first duly sworn, testified as follows: 289

*Direct examination by Mr. McKnight:*

My occupation between September, 1935, and March, 1936 was Manager of the Western Union office in the Hotel Astor. During that time I met a person by the name of Bert Erickson. He is sitting in the last chair in the first row (identifying the defendant Erickson).

I also know a person named Pierre LeVeque. Exhibit 41 is a photo of Pierre LeVeque. They requested me to fill out money order blanks. Government's Exhibit 6 for identification is one that I accepted pursuant to the request of either Pierre LeVeque or Bert Erickson. I didn't fill it out. I know I accepted it because my initial is up in the left hand corner, L., or the first initial. Government's Exhibit 15 for identification I also accepted. It had been filled out when I accepted it. And that was either for Erickson or LeVeque. I accepted 17 for identification; 18, 19, 22, 24 and 27 for identification I accepted and filled out. The whole thing is in my handwriting. 290

These names, both the addresses and the names to whom they were sent, were dictated to me either by Bert Erickson or Pierre LeVeque. 19 in evidence being addressed to P. L. Shea. 291

(The last above noted exhibits being Nos. 6, 15, 17, 18, 19, 22, 24, 27 and 28 for identification were received in evidence and read to the jury.)

(Witness excused.)

*Lillian Weiss—For Government—Direct.*

292 LILLIAN WEISS, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

In September, 1935, I was telephone operator, having supervision of the pay station in the Hotel Astor. There were eight booths.

I know a man by the name of Pierre LeVeque. Government's Exhibit 41 in evidence is Mr. LeVeque's photograph.

293 I know a man by the name of Frank Nardone. He is the first gentleman back of this row and the one nearest Mr. Dunigan (identifying the defendant Frank Nardone).

I also know a man by the name of Bert Erickson (identifying the defendant Bert Erickson):

I know a man by the name of Hoffman. His first name is Nat. He is in the first row, there (identifying the defendant Nat Hoffman):

I do not know a man by the name of Geiger. I think I know a man by the name of Jiggs, but I am not sure. I am not sure if I recognize Government's Exhibit 46 in evidence (a photograph).

294 I do not know a man named Saunders. Though I know Big Red. Exhibit 2 for identification is a photograph of Big Red. -I do not know a man by the name of Kleb. Though I know Bill, not Big Bill. Government's Exhibit 1 is a photograph of Big Bill.

I think the approximate date when I first saw Nardone was in the fall of 1935, but I am not sure. I saw Nardone in company with LeVeque at the pay station at the Hotel where Frank made local calls. I don't know how many times I saw Nardone at the Hotel Astor although it was a few times. At different times I saw LeVeque and Erickson. I saw Hoffman a few times. Several times Nardone, Hoffman, LeVeque and Erickson were together. I think



*Lillian Weiss—For Government—Direct.*

more than once they were together. Sometimes<sup>o</sup> they came alone. I don't remember which one came and how they came.

I saw them conversing together from time to time, though I did not hear any of the conversations. On a couple of occasions Bill sometimes was present. I was requested by those persons whom I have named to make long distance calls. Mr. LeVeque making the most requests. The calls went to Yarmouth, Halifax and Montreal.

Mr. Ducose, I don't remember his first name—was it Mike Ducose, that is my best recollection, Mike Ducose, Mr. LeVeque and Mr. Erickson requested me to fill out money order applications. Mr. LeVeque and Mr. Erickson, not Mr. Nardone.

Government's Exhibits 11, 12, 14 and 20 for identification are in my handwriting and I filled them out either at the request of Mr. LeVeque or Mr. Erickson, I don't know which.

(Government's Exhibits 11, 12, 14 and 20 for identification received in evidence.)

Government's Exhibit 8 is in my handwriting. It was filled out at the request of Mr. LeVeque and Mr. Erickson, but I don't remember which one.

(Government's Exhibit 8 for identification received in evidence.)

I last saw Mr. LeVeque around Christmas. They started coming there, I believe, in the fall of 1935. I first saw those persons named around the Astor, a few months before then I saw Mr. LeVeque.

These Western Union money orders would not refresh my recollection as to the times when I saw him there. I said that I filled those out at the request of either LeVeque or Erickson during the period of time that they frequented the Hotel Astor. I don't know if Mr. Nardone and Mr.

*Lillian Weiss—For Government—Cross.*

298 Hoffman were together at the time. They didn't come to the Astor steady. Sometimes they came and sometimes I did not see them. The record shows on the sheets that you got from the hotel, the long distance calls.

I saw LeVeque a few years there but he didn't always make calls. The last time I saw him was around Christmas, 1937. No, I made a mistake. It was not 1937. I am thinking of the first trial. It was 1936 when I saw Mr. LeVeque.

I think that the first time I saw him at the Astor, since these telegrams are dated December, 1935, I saw him then. The longest one I knew was Mr. LeVeque and the others toward the latter part of 1935. That was around the time  
 299 when these money orders were filled out. There came a time when they did not show up at the Astor any more, though they never did come to the hotel steady. It was a little while before the booths closed. I don't remember the date, I think in the early part of 1936. It was not long after these money order transactions.

*Cross-examination by Mr. Cahill:*

My memory isn't clear as to just when any of those persons came to the booths. I didn't make any notes of those occurrences, they were just customers. I didn't make  
 300 notes of when those people were in the vicinity of my booths. There is a broker's office near the booths along the lobby of the hotel. There are a number of places of business in addition to the broker's office near the booths, Western Union and Postal, flower shop, cigar stand, a newspaper stand and theatre ticket offices.

*By the Court:*

My booths were down a little hallway on the 44th Street side and all the stores are on Broadway, and the cigar stand and theatre tickets is on the 44th Street side.

*Lillian Weiss—For Government—Redirect.**By Mr. Cahill:*

The brokerage office is right near my booths. I could not remember how many calls I took a day, sometimes hundreds. I was on duty eight hours, 6 days a week. I saw a hundred people around there. I worked there 17 years—two years at the pay station. They closed the booths there in 1935, I don't remember the date. Then we went upstairs. There were a few steady ones and a few relief girls. The people on their way to the brokerage office had to pass my booths.

*By Mr. Climenko:*

Mr. Hoffman never gave me any money orders.

Q. And do you know whether he ever passed your booths on the way to the brokerage office? A. If he went into it. I don't just remember. I don't remember him going into the brokerage office or not. He may have gone in, I don't know.

*By Mr. Halle:*

I signed the name Louis Halle a couple of times on those telegrams. I never met Louis Halle but I think I know him. I think he is Mr. LeVeque's lawyer. I think that is the man (pointing to Mr. Cahill). I don't remember ever meeting you (Mr. Halle). No, I said I knew of Louis Halle. I never met Mr. Cahill. Mr. Halle never asked me to sign any telegrams.

*By Mr. Dunigan:*

I saw Mr. Halle at the prior trial. That is the only knowledge that I have of him. I took calls for these people, LeVeque, Frank and Erickson from time to time. I was

*Floyd H. Lancaster—For Government—Direct.*

304 asked to put in local calls by Mr. Nardone from time to time and I got incoming calls for Mr. Hoffman. It cost 10 cents to use my place and five cents downstairs. I got permission to receive incoming calls for Mr. Hoffman and I delivered messages.

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FLOYD H. LANCASTER, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

305 *Direct examination by Mr. Dunigan:*

I am an electrical engineer in Georgia. (Prior to 1934 I was in the United States Coast Guard, having been connected with the Coast Guard for six years. After I left the Coast Guard on November 30, 1934 I went to rum-running.

I have known Kleb several years. In the latter part of 1934 and first part of 1935 I assisted Mr. Kleb in smuggling alcohol into the United States in the vicinity of Freeport, Long Island. Some time in the middle of January I was on the Monololo when the Monololo was sunk. Mr. Kleb owned the boat. He told me so. Van Austen was the captain.

306 We made three trips on the Monololo, brought in alcohol to Freeport; the last trip we struck something at sea, we had to take to the dory and row ashore and we had to be taken into the State Trooper's barracks to be treated for exposure and after being treated for exposure we returned to Freeport and the next morning when the Monololo was washed up on the beach we were identified as the crew of the Monololo. Bill Kleb was not on the Monololo.

After the sinking of the Monololo I was taken down into New Jersey somewhere, stayed there three weeks, and then

*Floyd H. Lancaster—For Government—Direct.*

some time in February, 1935 I was taken and put on a boat called the Ganiff. I never knew whose boat it was. I know the defendant Nat Hoffman. He is the third gentleman on the right in the front row (indicating). I first met Hoffman in Freeport. It was sometime between December 1st, 1934 and January 30th, 1935. I never was introduced to him.

I used to assist in transferring the alcohol on a dock to a building where it was to be loaded on trucks for shipment to New York. Mr. Hoffman was there on two or three occasions. He was there part of the time when it used to be loaded on the trucks. He used to give instructions. Once he issued instructions to me. He gave me some money to buy some gas to put into a truck that was being used to transfer the alcohol. The duty was not paid on that alcohol that was being brought in to my knowledge. The Ganiff operated out of Halifax, it brought alcohol down to be landed on Long Island at various places. I was taken out and put on the Ganiff off the coast of Long Island.

It was a strange crew, fellows I didn't know took me to the Ganiff. Kleb was the one who told me to go and I acted in the capacity of super-cargo. After I boarded her we went to St. Pierre, Miquelon, Nova Scotia. Neither Kleb nor Van Austen were aboard. When I got up to St. Pierre we took aboard another load of alcohol, about 2,700 cases with 6 gallons to the case, and came down off the Long Island coast and it was taken in to Freeport. I did not see Hoffman in connection with the unloading. I stayed on the Ganiff. That was the last trip that the Ganiff made. After that I stayed aboard the Ganiff in Nova Scotia for about three months.

I sailed on the Isabel H. Before I went on the Ganiff I was staying at Freeport where I shared living quarters with Mr. Van Austen. At that time I often had conversations with Kleb concerning the smuggling of alcohol. We used to



*Floyd H. Lancaster—For Government—Direct.*

310 discuss bringing it in, where we would bring it. Kleb spoke of his connections to me. He said Mr. Hoffman and Mr. Nardone were the people that owned the cargo.

Carmine and Nardone were the same persons. Sometimes he would be referred to as Carmine and sometimes as Nardone and Kleb referred to him as Carmine or Nardone. We used to discuss practically all phases of the work. He used to come around to the room where Mr. Auster and I stayed and if that was the work we were engaged in we would talk about it practically all the time. I did not meet Carmine or Nardone. Mr. Kleb came up to Halifax and said that the port of St. Pierre was to be closed, but he was of the opinion if we could get out there with the Ganiff before the port closed and we went to St. Pierre but arrived there the day after the port closed. In turn we came back to Halifax. Mr. Kleb left and came back to New York. Sometime after that Mr. Kleb sent a telegram back to the agent, Bill Moriority.

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About July 1, 1935, the radio operator notified us to ship aboard the Isabel H under the command of Captain Harry Ducose. I had conversations with him concerning my duties on the Isabel H. First, I asked him how much pay I was going to get and what my duties were to be on the Isabel H, and he said I had to go as a sailor. I said I didn't like to go as a sailor. I asked him how come. He said my outfit and his outfit had joined together. That is Mr. Erickson and Mr. LeVéque. I did not have any other conversations with Ducose at that particular time. After I went on board the Isabel H we went 20 miles east of St. Pierre and took aboard a cargo of about 3,000 cases from a steamer named the Jan or Jon. We came down off the coast of Long Island and put part of it aboard another boat but I don't recall what the name of it was. The other boat couldn't get in with it and it came back and put

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*Floyd H. Lancaster—For Government—Direct.*

it aboard the Isabel H again and we went back up north around a little bit south of St. Pierre, waited a few days up there and the Pronto, under the command of Captain Conrad, came out and I went aboard the Pronto. We came down the coast and brought in a load to Keansburg, New Jersey. I believe that would be some time in the middle of August, 1935.

Captain Conrad said he had orders from Mr. Kleb for me to go aboard the Pronto when he came alongside. When I went to the dock at Keansburg I met Mr. Kleb, who supervised the unloading. We unloaded the cargo, went back to sea to the Isabelle H in the vicinity of Nantucket Lightship, 25 or 30 miles from Nantucket and got another load, which we took into Keansburg. There was about 900 cases to a load and each case contained six gallons. The cases were similar to Government's Exhibit 32 for identification. Kleb likewise supervised the unloading on this second trip. There was very little salary that I received, but what I did, Mr. Kleb gave me.

After this second unloading at Keansburg we went back to the Isabel H, took another load aboard, went off the Keansburg dock and was rammed by the United States Coast Guard Argo and it was towed into New London, Connecticut. I went ashore at New London, Connecticut. Then I was taken out about 15 miles and I stayed there while the Pronto was repaired. The crew of the Pronto stayed at a hotel in New London run by Mr. Shea. I was tied up in New London around three weeks or a month, during which time I saw Kleb and I discussed with Kleb the repair of the Pronto. I wondered how much it was going to cost, how long it would take to get it repaired, and if the Government would have to pay for the alcohol. The alcohol that was on board was confiscated by the Government. I met Mr. Erickson at New London. Mr. Erickson came one night at the place where I was staying,

*Floyd H. Lancaster—For Government—Direct.*

316 we went up to a tavern and stayed awhile. This would be sometime in the latter part of October. We went up to a tavern and stayed there a while. We were all broke, the crew. We didn't have any money. I asked Mr. Erickson if he would give me any money to get my teeth repaired. He said he would give me ten dollars. We spoke generally about when we would get back to sea and the expense of it

317 The last of October or first of November, 1935, we went back to sea with the Pronto. On that occasion we went out and met the Isabel H off Yarmouth, Nova Scotia, took aboard the balance of the cargo of 800 cases and took it into the Keansburg dock. This was three days after the Pronto sailed from New London, which would be around the first of November. On this occasion Kleb was at the Keansburg pier supervising the unloading of the cargo. Mr. Erickson was there also. After this third trip of the Pronto I went back to Yarmouth, Nova Scotia, and tied up there and were there somewhere around three weeks. Mr. Kleb came up and we had instructions to sail again and as we got ready to sail we discovered trouble with the motor. We got the parts to repair the motor, repaired it, and sailed out to sea and we arrived at Keansburg November 22nd. We had on board a cargo of 900 cases. Mr. Kleb 318 was not at the Keansburg dock this night but Mr. Erickson was in the engine room of the Pronto.

He told me to stand by the boat, that there was some Federal men hanging around and if they showed up we were to take the boat to another dock and complete the unloading. He said they weren't going to get the cargo if it could be helped. He brushed up against me in the engine room and I felt something hard in his pocket. I asked him if that was a rod. He said yes. I asked him if he was not playing kind of rough and he said they was not going to get the cargo.

*Floyd H. Lancaster—For Government—Direct.*

Then we went out to sea. Van Austen left the Pronto at the dock and he was not on board when we sailed out again. Captain Conrad was in command. When we left the Keansburg pier we went back to Yarmouth, Nova Scotia, where we stayed about 2 months; we left in January, 1936. We tied up there for a period of somewhere around two months. Kleb was up once. He was using the name Walter Adams. I saw Ducose during this particular period but not Erickson. I didn't know LeVeque at this particular period I am telling about. I saw him in jail in South Carolina.

Kleb paid me a little money when I was up in Yarmouth. I asked him what was the matter, that I could not get paid in full for the time I had in. He said the combination was in hard shape and didn't have much money and we would have to go out and take one load so they could pay us off.

The Isabel H was tied up in Halifax during the period I was on. In 1936 we went down off the coast of Georgia and took a load of about 900 cases off the Isabel H. We went down the coast of South Carolina. After we got off the coast of South Carolina we were seized by the Coast Guard Cutter Yamagran and taken into Charleston.

Captain Conrad, Adrian Van Austen, Cecil Baars, Samuel Martin, Peter Romain, and myself were on board. The last time I was at Keansburg when I saw Erickson and I went back up to Yarmouth. I believe I said, I didn't see Kleb and Van Austen in Yarmouth. I asked Kleb about the shooting which took place there which we had read about in the papers in Canada. They knew very little about it. Kleb and Van Austen didn't seem to know much about it themselves.

They said that there had been trouble there and part of the cargo was lost. I was in South Carolina and was towed into Charleston. I was indicted in South Carolina in connection with that matter.

*Floyd H. Lancaster—For Government—Cross.*

322 I am 31 years old. I have the degree from the International Correspondence School and I am accepted as an electrical engineer by an engineering company which I am now employed with.

I know Leo Murphy. He is the man with his hand up to his chin. I first saw him in the engine room of the Isabel H. When we took a cargo off from her from Georgia's banks. He was still on the Isabel H when the Pronto was off the Carolina coast, as far as I know. Erickson is the last gentleman on the right in the front row. During the time I was employed by Kleb, I did not know Big Red.

323 *Cross-examination by Mr. Climenko:*

I graduated from public school in the State of Maine. I took special courses in the International Correspondence School while in the United States Coast Guard and attended several schools while in the United States Coast Guard. I am a native of Bangor, Maine. I went to a public school in Pittsfield. That time I was living with my folks. I was 20 years old when I went with the Coast Guard and was with them six years.

324 I left the Coast Guard with a clear record, and then I decided to go into rum-running—I say that without hesitation. I was paid while in the Coast Guard. Then I started rum-running. I wouldn't know exactly—sometime in 1931 I first met Kleb. I was employed by Kleb after I left the United States Coast Guard a few days after November 30, 1934.

I met Mr. Hoffman in Freeport after I went to work for Kleb. It was sometime between the first of December and the middle of January, 1935. That is when I met him the first time. Nobody introduced me to Mr. Hoffman. This was at the garage where we was transferring the alcohol



*Floyd H. Lancaster—For Government—Cross.*

from the dock up to this garage. There was a good many men employed hauling it up into a garage; I should say 15 or 18. 32

I recall some of the names of those 15 or 18. I supplied those names to Mr. Dunigan. Mr. Dunigan first questioned me in connection with this case when the Pronto was seized in South Carolina. This would bring us to January 22, 1936. I do not mean the attorney who sits here but another Mr. Dunigan in another branch of the Service. I was first interrogated in regard to this matter by attorneys associated with the Government when I came up here and appeared before the Grand Jury in May, 1938.

After I went to work in South Carolina, that is between January, 1936 and May, 1938, several agents came and asked me questions. I went to work a week after I was released down there, and no sooner had I been released when agents came to see me. It would be, I believe, around June of 1937. 32

So that from January of 1936, to June of 1937, I had not been questioned with respect to any of these matters. The inquiry in June of 1937 continued for one night and the next forenoon. They talked to me until about 9:30 or 10 o'clock one night at my office where I worked, and I met them in town (at the Francis Marian Hotel) the next morning and talked some more with them. 32

That was the end of that interview. I was not asked to do anything. The first time I heard from any representatives of the Government in respect of this matter was, when I was served with a subpoena to come up here and testify before the Grand Jury.

Last May, I believe, I came up here and testified. Then I went back to my job. Three weeks ago I was requested to come here this time, arriving in New York yesterday morning. I have no particular grievance against anybody in this matter. My salary was paid by Kleb. I don't recall any

*Floyd H. Lancaster—For Government—Cross.*

328 particular time when I gave the names of the other persons who were present at Freeport when I saw Hoffman, but I have told my activities several times and that was brought in as a matter of fact, that way.

I never saw my testimony transcribed nor read any statement that I gave. I imagine Mr. Wallace of the Customs Service, Savannah, Georgia, and his assistant was with him, the United States Marshal of Charleston, South Carolina, and Mr. Dunigan and Mr. McKnight and Mr. Kozak, associated with the Government to whom I revealed the identity of the persons besides Hoffman when I saw Hoffman in Freeport.

329 I am certain that I mentioned those names at least to those last persons. I saw Hoffman at Freeport, Long Island two or three times. He was not engaged in physical activity, any hauling on those times. He gave me orders, telling me to get some gas for the truck. That was the only direct order he gave me.

I drove the truck. Kleb paid me. Hoffman never did. I heard Mr. Austen, Mr. Kleb and several other fellows from New York who was out there, calling Mr. Hoffman Nat, and on hearing Nat Hoffman's name used I asked who that man was, and they said it was Nat Hoffman.

330 I didn't ask him who he was, I asked some of the fellows who was working there, asking me to buy gasoline. Mr. Hoffman never asked me to do anything else nor had I any other conversation with him outside of his asking me to buy gasoline.

The only words that were uttered between us was his suggestion about buying gasoline. I saw him altogether on two or three occasions. I could not give the exact date, only that it was in between December 1st and the middle of January.

I believe I said, in answer to Mr. Dunigan, the end of December. I believe I went to work for Mr. Kleb the 1st of

*Floyd H. Lancaster—For Government—Cross.*

December and then we lost the Monololo around the middle of January and shortly after I left the United States for Canada. 331

I saw Mr. Hoffman on two or three occasions during that interval while I was working with the Monololo. I had nothing to do with the Pronto during that time. Whatever rum-running I was doing was with Monololo, which was owned by Mr. Kleb. I never spoke with Mr. Hoffman with respect to the alcohol that was on it.

Kleb came to employ me because I knew him for three or four years previous to this through my friendship with Mr. Austen who used to be in the Coast Guard with me. Mr. Austen and I had been in the Coast Guard for a long time. I never saw Mr. Hoffman after the middle of January, 1936. The first date that I went to Keansburg was sometime in August, 1935, I believe. The last time was November 22, 1935. I had met Mr. Hoffman in Freeport previous to that, sometime between December 1, 1934, and the middle of January, 1935. I did not tell Mr. Climenko before I met him first in December of 1935. 332

Nobody identified Mr. Hoffman in this courtroom or in this building within the last few days. I recognized him immediately from my own recollection of him. I did not have any conversation with any person prior to taking the stand as to seeing Hoffman in this courtroom. I am certain of that. 333

*Cross-examination by Mr. Cahill:*

I don't know Nardone and in the course of all these alleged operations I never met Nardone.

I was in the Communication System in the Coast Guard, building telephone lines, maintaining them. The last of it I had charge of teletypes in the New York Division. I was not engaged in the tapping of wires or anything of that

*Floyd H. Lancaster--For Government--Cross.*

334 sort. I did not go on board Coast Guard boats, though I was around their stations.

I became acquainted with Kleb through Mr. Austen several years ago, sometime around 1931 or 1932. I knew him for several years before I left the Coast Guard Service. I was stationed in the Coast Guard at Freeport, Long Island. That was very close to where he lived. I did not have anything to do with the giving of messages or the transmission of messages of the Coast Guard, just building telephone lines or fixing them. My rank in the Coast Guard was electrician's mate, first class. I did not wear a uniform. During my full period of work I was not stationed on Long Island, I was at Atlantic City in New Jersey. I was also at the Cape May station. Our headquarters was at Atlantic City, I was up and down the coast.

I ceased to be on speaking terms with persons alleged to be connected with these operations. It was over money matters. I made some claims on persons with whom I worked but I was not paid, no, sir. The controversy never was settled. I just gave it up. It is closed as far as I am concerned. I still believe there is money due me. It never was paid. I have discussed my claims.

336 My acquaintance with Kleb and Van Austen has continued then right along from 1931. I remained friendly with them during the years from 1931 on. When I knew Kleb then I was in the Coast Guard. I knew the business he was supposed to be in. He had the reputation of being a rum-runner. I know the occupation Van Austen was said to have had during that time. During that time I met them and went to lunch or dinner with them once in a while. This was around Freeport. I might have made trips to New York with them but I don't recall them. I went to theatres with them and generally I had pleasant social relations with them. These relations have not stopped. Recently I went to theatres, lunch and dinner with them. This was with Austen, not with Kleb. It never was with Nardone. I never met him in my life.



*Floyd H. Lancaster—For Government—Cross.*

At the time when I was in the Coast Guard it was my duty and I had been instructed by my superiors that it was my duty to report any suspected violations of the Customs Law, the Anti-Smuggling Law, or any law relating to the importation of liquor or other goods into this country without paying the duty. If I saw anything suspicious it was my duty to report it.

My relations with Kleb and Austen were known to my superiors. At the time I was having lunches and going to theatres with them I did report my social relations to my superiors, to Warrant Officer Frank L. Beet; Communication Officer Lieutenant Eastman.

I was not given instructions to get information about their occupation and employment and I did not try to get information. My superiors asked me not to continue these social relations. I continued going to lunches and theatres with Mr. Austen. I was seen with Mr. Austen several times after. I did not report to my superiors that I was doing that. I didn't try to hide it from them. I was never brought up on trial in the Coast Guard. I resigned voluntarily from the Coast Guard. I went at once into another occupation with Bill Kleb. That was within a few days or a week or so after I left the Coast Guard.

I made the arrangement to accept employment from Kleb the night I went to New York with him. The preceding three, four or five days I didn't see Mr. Kleb. Prior to the time I went into his employment I never discussed this with him. I was intending to go to work for an advertising company when I left the Coast Guard. It was a company Mr. Kleb was interested in named The Voice of the Sea. It was an established concern with their place of business at Freeport, Long Island, but the boat where the business was on was tied up at a shipyard. The business was on a boat, it was a boat. They had contracts to go to places like Coney Island. They had a contract with the Tom Collins gin people for one. I did not see the contract.



*Floyd H. Lancaster—For Government—Cross.*

340 I was to be the sales manager. My salary was commission. I heard of the Voice of the Sea before. I left the Coast Guard and spoke with Kleb and Van Austen about it, they talked with me about the development of this enterprise and they suggested they needed a man like me. They made approaches to me with respect to my employment. I discussed that several weeks before I left the Coast Guard. I did not have a written contract with them.

I knew Van Austen since 1928—his name was Van Austen, he was not a native of Maine, he came from South Carolina.

341 Nobody ever talked with me about the possibility of my being indicted in this case, or any other case outside of South Carolina. I never thought of asking about that.

*By Mr. Climenko:*

Q. Mr. Lancaster, I understood, finally, you to say that you had seen Mr. Hoffman on two or three occasions between the 1st day of December, 1934, and the middle of January, 1935, is that correct? A. Yes, sir.

Q. Was it two or three times that you saw him? A. I cannot say exactly.

342 Q. Can you say you saw him the two or three times in December, 1934, or January, 1935? A. No, sir.

Q. You have no way of telling whether it was December, 1934, or January, 1935? A. No, sir.

Mr. Climenko: On behalf of the defendant Hoffman I move to strike out all of his testimony with respect to those meetings for on his own testimony he is not able to tell when they occurred.

The Court: I will deny your motion.

Mr. Climenko: Exception.

*Floyd H. Lancaster—For Government—Redirect.  
Beriah M. Thompson—For Government—Direct.*

343

*By Mr. Dunigan:*

Mr. Dunigan didn't tell me anything about my being indicted in this case, and I never asked him anything about it because I felt I had paid the penalty down in South Carolina. I didn't ask him anything about it. I came into his office yesterday morning before I came to the courtroom and there I was shown a number of photographs. Out of that number of photographs I selected one.

~~\_\_\_\_\_~~  
New York, March 15, 1939.

344

Trial Resumed.

BERIAH M. THOMPSON, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

I am a consulting expert in the office of the Secretary of the Treasury, Washington, D. C. I am a retired Commander of the United States Navy. In 1935 I was a special assistant to the Secretary of the Treasury. During that year my official duties took me to Antwerp, Belgium, approximately October 10, 1935. In Antwerp I consulted with the American Consul General there and others in connection with a study of the smuggling situation as regards alcohol smuggling against the United States.

345

I recognize Government's Exhibit 42 for identification as photographs which I had taken in Antwerp, of the S.S. Rydoon loading alcohol. The approximate dates were October 21st and 22nd. I saw the vessel Rydoon at the

*Beriah M. Thompson—For Government—Direct.*

346 pier in Antwerp and I arranged to have photographs taken of the vessel loading alcohol. (Marked Government's Exhibit 42 for identification.)

Those photographs in Government's Exhibit 42 for Identification represent scenes which took place in my presence and which I observed. (Marked Government's Exhibit 43 for identification.) I first saw Government's Exhibit 43 for identification on the dock at Antwerp, alongside the Rydoon. Government's Exhibit 43 was attached to a case of alcohol when I saw it. Government's Exhibit 42 was also attached. It was removed. I was present when it was removed and I subsequently brought it back to this country.

347 (Paper marked Government's Exhibit 44 for identification.)

I recognize Government's Exhibit 44 for identification. I first saw Government's Exhibit 44 for identification on a case of alcohol being unloaded from the Pronto at Charleston, South Carolina, on January 21st, 1926.

Mr. Dunigan: Mark this for identification.

(Marked Government's Exhibit 45 for identification.)

348 I recognize Government's Exhibit 45 for identification and I first saw that particular exhibit on March 27, 1936, in a warehouse in Newark, New Jersey, under the custody of the Alcohol Tax Unit at that place. It was attached to a case of alcohol.

In Antwerp I noticed some of the numbers or markings being loaded on the Rydoon. The numbers which I observed at that time were within a range of 400 to 19,700. Exhibit 32 for identification bearing the number 16,655, would be within the range of the numbers on the cases being loaded on the Rydoon in Antwerp. When these cases were being loaded on the Rydoon there were two cases which had

*Beckworth Jordan—For Government—Direct.*

broken up during the loading and I observed them, or rather the cases had started to leak and they were opened for the purpose of repairing the cans. I smelt alcohol. 349

I testified that Government's Exhibit 43 for identification was taken from a case in Antwerp. That particular exhibit is similar to Government's Exhibit 44.

(Government's Exhibit 44 for identification received in evidence.)

(Government's Exhibits 43 and 45 for identification received in evidence.)

The Court: 42 for identification is received in evidence, with an exception to the admission of all of those exhibits. 350

BECKWORTH JORDAN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

I am a Lieutenant Commander United States Coast Guard having been in the Coast Guard service 14 years. I am at present stationed at Defoe Boat and Motor Works, Michigan. In 1935 I was at Newport, Rhode Island. From Newport I did patrol duty. In the course of those duties I observed the movement of the vessel Pronto in 1935. In the early evening of the 9th of September, 1935, I located the Pronto in the vicinity of Nantucket Lightvessel and remained with her until she entered Canadian territorial waters, at which point I dropped her. The boat was loaded. 351

I don't remember seeing the Pronto earlier that year. About the time I have just related seeing the Pronto I

*Beckacorth Jordan—For Government—Direct.*

352 saw the Isabel H. After having dropped the Pronto in Canadian territorial waters I was returning to my normal cruising station, south of Nantucket, and while off George's Bank, approximately east of Long Island, I located the British Oil Screw Isabel H. She returned toward the Nova Scotia Coast. She was also loaded at the time. (Marked Government's Exhibit 46 for identification.)

I recognize Government's Exhibit 46 for identification. It is the British Oil Screw Isabel H.

(Government's Exhibit 46 for identification received in evidence.)

353 I saw the Pronto again at approximately noon on October 5th, 1935. I was in a position approximately 60 miles southwest of Montauk Point, Long Island, and I located the Pronto. I remained with the Pronto the remainder of that day, picketing her when she drifted and trailing her when she was under way. Approximately thirty minutes past twelve, midnight, on the morning of October 6th, 1935, the Pronto, in attempting to get away from the Argo, cut under the Argo's stern and a collision occurred. The Pronto filled with water and sank to the main deck level. We placed our collision mat over the rupture in the Pronto's hull and attempted to pump her out. Weather conditions made our attempt unsuccessful. The crew were removed from the Pronto to the Argo.

354 At the time we attempted to pump the Pronto out, the Pronto had a cargo aboard. There were a large number of cases (similar to Exhibit 32 for identification) stowed below deck. I towed the Pronto to a position 15 miles south of Montauk Point. I was relieved by the Coast Guard Cutter Champlain.

I had occasion to notice the movement of a vessel called the Rydoon. I do not remember the date, the middle of November would be approximately correct. We picked up the Rydoon approximately 90 miles south of Cape Race, New-



*Beckicorth Jordan—For Government—Direct.*

foundland and trailed her to a position 100 miles south of St. Pierre where the Rydoon stopped and drifted. 3

We likewise stopped and drifted. There were several smaller vessels drifting in the vicinity of the Rydoon that we recognized. There was the British Oil Screw Isabel H, Anna D, Ganiff, Florian, Assaganal. They went alongside the Rydoon one at a time and immediately started taking cargo from the Rydoon.

The Isabel H was the first observed taking cargo from the Rydoon. I recall one of the boats called the Alpaca taking off cargo after the Alpaca took cargo. I trailed it. Prior to my trailing the Alpaca I observed the Isabel H taking on a load. 35

During the time it was unloading I was to leeward to the Alpaca and the Isabel H. My vessel was approximately 75 feet away from the Isabel H during the time she was alongside the Rydoon and an odor of alcohol was distinctly noticeable. (Marked Government's Exhibit 47 for identification.)

I recognize Government's Exhibit 47 for identification. That is a true and accurate representation of the scene as I saw it. That is the Norwegian Steamship Rydoon with the British Oil Screw Anna D alongside.

Whether these photographs were taken at that time is not within my own knowledge. They were not taken on my boat then. (Government's Exhibit 47 for identification received in evidence.) 35

Government's Exhibit 48 marked for identification and is also a true and accurate representation of the scene during the time I was there. (Government's Exhibit 48 for identification received in evidence.)

Government's Exhibit 49 marked for identification is a true and accurate representation of the scene. (Government's Exhibit 49 for identification received in evidence.)

Government's Exhibit 50 marked for identification and is a true and accurate representation of the scene as I saw

*Beckworth Jordan—For Government—Cross—Redirect—  
Recross.*

358

it at that time. That is my vessel in that picture just appearing around the bow of the Rydoon—I can recognize that as being my command. That is the Argo. (Government's Exhibit 50 for identification received in evidence.)

359

At the time that I took the crew of the Pronto on board the Argo following the collision I made a record of the names of the members of the crew. I recall Harold Conrad the master. I saw Mr. Lancaster who testified here yesterday, and recognized him as one of the members of the crew on that occasion. I also recognize another gentleman in the crew as having been a member of the Pronto. His name is Wallace. (Mr. McKnight had Mr. Van Austen stand up.)

That is the man I know as Mr. Wallace (meaning Van Austen).

Coast Guard boats are pretty much alike, but in this instance that is the Argo.

Mr. Cahill: No cross-examination.

*By Defendant Brown:*

360

I was out at sea when I smelled the alcohol. I was 75 feet to leeward of the Rydoon and the Isabel H. In the open air less distance than the depth of this courtroom. I can smell that case. (Q. But you can smell it 75 feet away, and this is an enclosed room. A. No answer).

*By Mr. McKnight:*

I saw a great many cases being unloaded one boat to the other. A great many of them were dropped on deck and smashed.

*By Mr. Nolan:*

I mean by to leeward down wind. In other words the wind is blowing toward you from the other ship.

*Leo Francis Murphy—For Government—Direct.*

LEO FRANCIS MURPHY, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

I live at Wedgeport, Nova Scotia. I am a plumber by trade. I know a man by the name of Harry Ducose, also a man named James Bellman. On Government's Exhibit 51 for identification I see the photograph of Ducose. He is the first one on the left side.

I have been on the Isabel H. This looks like the ship the Isabel H. I was in the courtroom when Bill Kleb was testifying, and Mr. Dunigan asked me to stand up when he was on the stand. I know that man Kleb. Having seen him at Halifax on the Isabel H. I signed on the Isabel H on the 5th of December, 1935. Ducose put me on board. I have seen Ducose in conversation with Kleb on the Isabel H. I also saw those two at the Halifax Hotel. I was present.

The conversation I heard was between Ducose and Kleb. I have forgotten what they talked about. The substance of what I heard was that they tried to make arrangements for cargo; cargo of alcohol. Money matters were also discussed.

I heard Ducose talking over the long distance telephone to a fellow named LeVeque and to Mr. Erickson. He talked about money matters to LeVeque. I heard him place the call. I was in the room at the time. Mr. LeVeque called from New York.

I did not hear him mention the name Pierre or LeVeque, but he told us afterwards that was Pierre LeVeque. He and Ducose spoke about cargo. I didn't know him then. I did not meet Erickson in connection with this matter. When I signed on the Isabel H I was at Halifax. The boat was empty at that time. Bellman was on board, he was captain.

*Leo Francis Murphy—For Government—Direct.*

364 Ducose was on board, as were Albert Woodrow, Constant Mahe. He is French. There was another seaman—I forgot his name. After signing on the Isabel H we started repairing the engine.

I was signed off again on the 12th of December. I stayed aboard until February 14th, I think. She was not tied up at the pier in Halifax during this December period. We signed on again on December 20th. On that date we stayed aboard until the 24th when we sailed for St. Pierre Miquelon. When we arrived at St. Pierre we took a cargo of 2400 cases of alcohol. The cases were like this case here, Govern-  
 365 2 three-gallon cans. The cases were taken from the wharf at St. Pierre.

I did not see the vessel Rydoon. I heard Bellman say they met the Rydoon off St. Pierre and took a cargo off of her.

I never heard Kleb when he was at the Halifax Hotel make any calls to a fellow named Saunders in New York. Kleb did not mention any other names in connection with this alcohol besides Erickson and LeVeque, nor did Bellman. Ducose did mention LeVeque and Nardone.

When I went on board I asked who was to pay expenses. He said he would have to talk to Nardone and LeVeque  
 366 before he would make any commitment as to expenses.

When I took this cargo off the Rydoon we came off Yarmouth and laid there for two weeks. The approximate date when I took this cargo on board was December 28th. We were laying off Yarmouth waiting for the Pronto. The Pronto subsequently showed up in command of Captain Conrad. I know part of the members of the crew of the Pronto. Constant Mahe was on board. There was a fellow by the name of Mike, Pete Romaine—those are the only ones I can remember.

I was in court yesterday afternoon and saw Mr. Lancaster testify. He was a member of the crew on the Pronto.

*Leo Francis Murphy—For Government—Direct.*

"We called him Mike. That is the Mike I just referred to a moment ago. The Pronto came from Yarmouth when it showed up at the Isabel H. They had had trouble with the motors. I had a conversation with Ducose and Bellman about the repairs. 367

Ducose and the wireless operator, Cecil Baars, who was on board as wireless operator said they had trouble with the motors and were tired of waiting for it.

There came a time when we moved away from Yarmouth. We moved to George's Banks and when we got there we loaded with 800 cases and towed her to South Carolina. An hour and a half after she left us we had a telegram. She was taken in tow that came to the Isabel H. The Isabel H saw a couple of lights coming, knew it was an American cutter and started to run away. We were successful in getting away and went to St. George, Bermuda. Ducose and Bellman remained on the Isabel H. Mike was on the Pronto. The remaining cases, about 1600, were still on board the Isabel H. 368

I was in the hospital at St. George for three weeks. The Isabel H left me there. I got my hand hurt. After being in the hospital three weeks I came back on the Lady Nelson to Boston. When I left St. George, to my knowledge the Isabel H was still anchored there. I believe it was.

During the time I was there I did have a conversation with Ducose concerning the cargo. Ducose said they were going to try to land the cargo and come back to Halifax. The wireless operator on the Isabel H at that time was Constant Mahe. I had a conversation at that time before I left with Constant Mahe. I asked who was going to pay me. He showed me a list of the owners of the cargo. Pierre LeVeque, a man by the name of Erickson, a man by the name of Nardone and Ducose's name was on the list. 369

Q. Did you see the list? A. Yes.

Q. Names on it? A. Yes, sir.

Q. What were the names?



*Leo Francis Murphy—For Government—Direct.*

370 Mr. Cahill: I object to that, not binding. He is not named in the indictment as a co-conspirator.

The Court: Is he connected?

Mr. Dunigan: Yes, he was a member of this crew of the ship.

The Court: Objection overruled.

Mr. Cahill: Exception.

Q. What names did you see on the list? A. Pierre Le Veque, a man by the name of Erickson, a man by the name of Nardone and Ducose's name was on it.

Q. And he told you they were the owners of the cargo?

371 A. Yes.

Q. Did you know Nardone personally? A. No.

(Marked Government's Exhibits 52 and 53 for Identification.)

The scene in Government's Exhibit 53 for identification looks familiar to me. The Isabel H is on there. That scene is located at St. George, Bermuda.

Government's Exhibit 52 for identification is familiar to me. The Isabel H is on there, that was at St. George, Bermuda.

(Government's Exhibits 52 and 53 for identification received in evidence.)

372

I recognize Government's Exhibit 31 in evidence. It is a photograph of Captain Cenrad. This photograph is Mr. Martin, engineer on the Pronto.

(Government's Exhibit 54 for identification received in evidence.)

I recognize this photograph as Pete Romaine, second engineer on the Pronto.

(Marked Exhibit No. 35 in evidence.)

I am not sure of Government's Exhibit 35 in evidence.

*Leq Francis Murphy—For Government—Cross.**Cross-examination by Mr. Cahill:*

Mr. Ducose is dead. I know that his death was published in the newspapers. He was not dead at the time of the last trial. I cannot recall that at the last trial I mentioned the name of Nardone at all. I don't want to see the testimony at the last trial. I cannot remember that I did not mention the name of Nardone at all during that trial.

(Mr. Dunigan conceded the witness did not mention the name of Nardone.)

Ducose died two months ago I think. I heard some conversations between Ducose and LeVeque. They spoke in French. I speak French. I was born in Wedgeport, Nova Scotia. I was listening to their conversation when they were talking on the telephone. I was there with the wireless operator.

I do not remember testifying before with regard to the conversation between Ducose and LeVeque, "They were talking in French; I cannot say what they said." I don't remember just what they said. They talked about money matters and arrangements from the cargo. The statement here is as I made it, "I cannot say what they said." couldn't say every word.

I never knew Nardone. I never met him. I am not sure of testifying as to help for my injury and asking who would pay for the time I was obliged to spend in St. George as a result of that injury. I remember this testimony, page 54: "I did hear Ducose talk to Erickson. That is what he said. He said he couldn't put me in the hospital and pay the bill until he got authority from LeVeque and Erickson." It is correct.

Mr. Dunigan: I think he should read from the original record and not from the narrative record that went up on appeal.

*Leo Francis Murphy—For Government—Cross.*

The following questions were asked me, page 109:

"Q. Did you hear Ducose talk to Erickson? A. Yes, I have.

"Q. What did he say to Erickson? A. That is what he said. He said he could not put me in the hospital and pay the bill until he got authority from LeVeque and Erickson."

"Q. Did you hear Kleb talk to Erickson? A. Yes.

"Q. What did he say to him? A. He was trying to get advance money to fix the Pronto.

"Q. Kleb said the money to fix up the Pronto was coming from LeVeque and Erickson? A. Yes."

"Q. And I so testified in this other proceeding. I remember testifying at that time, in December, 1936, with regard to a conversation between Ducose and Kleb, page 110: "Tell us everything you heard Ducose or Kleb say? A. It has been a year ago.

"The Court: Did you hear anything they said?

"The Witness: No. I have forgotten."

I had forgotten about the arrangement for the ship and cargo. This proceeding was in December, 1936; at that time I had forgotten just what the conversation was I had.

I have not discussed with representatives of the Government recently the fact that Ducose was dead. In the course of our talks I told Mr. Kozak I thought he was dead. He did not say he knew that. He never said anything at all. That question did not come up in connection with the reference to Ducose. The fact that Ducose was dead was not commented on at all. I said quite recently I read in the paper that Ducose was dead. I seen a clipping where he was drowned.

I remember this question, page 105: "What did Harry Ducose say about Pierre LeVeque? A. I asked him what

*Leo Francis Murphy—For Government—Direct,*

they were going to do about my hand, so I could go to the hospital. He said he had no authority, he told me. I asked him. He said he had to get in touch with Pierre LeVeque and Burt Erickson before he could give me authority." I so testified and that was correct. 379

Bellman and the wireless operator showed me the list. The wireless operator had it first. I did not say anything about that when I was testifying before. That list was not mentioned before as far as I know.

I am doing plumbing now. I am under subpoena as a witness here. I am not sure if I am being paid for my loss of time. The American Consul sent me over from Yarmouth, Nova Scotia. 380

(Recess until 2:10 p. m.)

#### AFTERNOON SESSION.

*Direct examination continued by Mr. Dunigan:*

I told you this morning it was the radio operator on the Isabel H who had a list. Bellman also had the same list.

Constant Mahe, the radio operator, married my sister about four years ago. 381

I prepared for signing on the Isabel H knowing that he was on it, he had been on the Isabel H, to my knowledge, four or five months before I signed on, probably longer than that. When I joined I had discussions with Constant Mahe concerning the operation of the Isabel H. He told me he had gone outside and loaded the steamer and put it off on an American shore. I have forgotten what else now, it is so long ago, he told me that he had met a steamer and taken on cargo of alcohol and landed it.



*Leo Francis Murphy—For Government—Cross.*

382 After I got on board the Isabel H he told me about the cargoes of Isabel H, he told me that in New York it was to be landed in South Carolina. It was the time we loaded 2400 cases and subsequently picked it up at St. George's bank. I cannot tell you where the other cargoes had been landed. Whether it was in New Jersey. But he did tell me he had landed cargoes and this was to go to South Carolina. He told me Ducose told him and he told me he would throw that overboard if he—

I said this morning I was discharged from the Isabel H at Hamilton, Bermuda, these are my discharge papers (handing).

383 Mr. Cahill: Before I resume cross-examination I understood your Honor was considering taking some action with regard to a portion of this testimony. I would like to know now if your Honor is contemplating making a ruling.

The Court: There is no mystery about it. I was thinking of striking out this list, but I will not do it now.

Mr. Cahill: Exception.

*Cross-examination by Mr. Cahill (Continued):*

384 I worked on the Kirk and Sweeney and on the Patrick and Michael before I went on the Isabel H, these two boats were engaged in alcohol operation bringing in alcohol to the United States outside the limits and transferring them.

Cyrus Budreau was captain of the Kirk and Sweeney. Ross was captain of the Patrick and Michael. I do not know Captain Bill Smith. No indictment is pending against me, as far as I know, there was an indictment pending against me at Boston. I couldn't tell you if it is now pending. That was for this last trip that I made on the Isabel H.



*Leo Francis Murphy—For Government—Cross.*

There was a customs agent from Boston came to my home at Wedgeport, Nova Scotia and said I was indicted over here in connection with the Isabel H. He mentioned the whole crew were the other defendants. Some of the defendants on trial here. The Nardone case he called it. I do not know that Nardone was ever indicted at Boston, I never read the indictment or complaint. I said he was included and brought his name in specifically because the agent said he was indicted into the Nardone case. I think I have a copy of the indictment in my pocket here—I am not sure yet (taking paper from pocket). I have not the names of defendants. 385

That paper I just read is from Boston. It is for me to appear here in New York on March 6th, 1939. I will let you see it. This is addressed to me from the customs agent as William T. Murphy, Boston. It was in connection with the Boston case. I went to Boston; I had to go through Boston to come to New York. I did not stop off at Boston and saw nobody at all; I came to New York. I did not see Mr. Dunigan or Mr. McKnight, I saw Mr. Kozak. In the course of my talks with the representatives of the Government I did not talk about this case at Boston, that indictment. I haven't talked with any of them about it and I do not know whether it is pending. 386

*By the Court:* 387

I couldn't tell you for sure if there is one. I was not arrested in Boston nor did I appear before somebody there. I don't know a Captain Smith, known as Bill Smith, at all; I never heard of him.

Mr. Dunigan: To save time I would like to say this man was not indicted in Boston; he was indicted in South Carolina on account of the Pronto.

*Leo Francis Murphy—For Government—Cross.*

88 He is confused because an agent from Boston came up to see him.

Mr. Cahill: Then there is no such thing as a phase of the Nardone case, there is nothing pending about it.

Mr. Dunigan: No, he said he was indicted in connection with the Nardone case.

Mr. Cahill: We move to instruct the jury to place no reliance on the testimony in regard to Nardone.

The Court: I so instruct them.

89 I testified in the trial in New York here in 1936. The testimony Mr. Cahill read to me this morning was taken from the testimony of that case but I don't remember testifying to it all. That was the only place I testified in connection with these matters. Before I went on the stand in December, 1936, I made a statement to an attorney or representative of the Government. That was to Mr. Murphy I made a statement. I do not recall making a statement before Mr. Dunigan called me to the witness stand in 1936. I spoke with Mr. Dunigan or other representatives of the Government before I went on the witness stand. They asked me if I was aboard and what I was doing. They did not ask me all the facts. This agent from Boston asked me what I was doing before I went on the witness stand. I don't think it was taken down and I did not sign a statement. Mr. Murphy asked me where I had gone; what had happened to me.

90 They talked with me before I went on the witness stand but I don't recall what I said. No, I don't think I told them the truth. On the witness stand I did. What I testified on the stand was the whole truth as far as I can recall. I have not been discussing this case nor has my recollection been refreshed at all during the recess. I

*Leo Francis Murphy—For Government—Cross.*

have not been discussing it at all, not a word. When testifying, I stated that the events to which I was testifying occurred about a year before December, 1936. It was just about a year. My recollection should not be better now than it was then. I remember if I named certain persons as having been on board the Isabel H as members of the crew. 391

When I was testifying before, in December, 1936, I did not mention Lancaster, either under his own name or under the name of Mike, as being on the Isabel H. I testified as to who were on the Pronto at that trial also and I mentioned names of members of the crew. I remember testifying, "Q. At the time who was in command of the Pronto, if you know? A. Harold Conrad"; and that was correct. I do not remember being also asked: "Did you know any other members of the crew of the Pronto? A. Cecil Merz, Pete Romain, Marty Evans. There is two more guys, but I forget their names." Probably I did, I don't remember, but I knew Mike very well. He had been aboard that boat. I knew Mike when I saw him. I did not mention his name at that time because I must have forgotten his name, but I remembered the names of the others because they belonged down my way. I did not know Mike very well, I knew him when I saw him. I used the expression I knew Mike very well. I knew him in Yarmouth, that was my home town at that time. He was not a neighbor of mine but I knew him there. I only knew him about a month or so before when I saw him. Our acquaintance did not continue after that. When we came on at George's, he was on the Isabel H. The Government gave me some money. They paid my way over here, the last trip I was over here, and paid me \$6 a day. I have a similar arrangement at this time. As far as I know I am losing money by it, too. I did not get any lump sum from the Government nor did I get one hundred or two hundred dollars. 392 393

*Leo Francis Murphy—For Government—Cross.*

394 In connection with my hand, I think Ducose paid my hospital bills and the lawyer's bill. The Government did not do it. The only man with whom I had many dealings in connection with the boat was Ducose. I testified in this other proceeding: "Did you talk to Ducose and Bellman in the hospital? A. I talked to Ducose in the hospital."

Q. "Q. Tell us what conversation you had with Ducose. A. He asked the doctor how long I was going to stay there." You stated that? A. Yes.

Q. On page 104: "Tell us what this conversation was that you had with Ducose. A. Ducose told me they may get out most any day, and I should go home, and the doctor would not let me. My hand was hurt, of course. I said if I stayed there I did not know what was going to happen. Your ship might hide another ship to come to Boston'."

395

Q. And on page 105: "What did Harry Ducose say about Pierre LeVeque? A. I asked him what they were going to do about my hand, so I could go to the hospital. He said he had no authority, he told me. I asked him. He said he had to get in touch with Pierre LeVeque and Burt Erickson, before he could give me authority, and he never did."

396 "Kleb was waiting for repairs or money for the Pronto? A. Yes.

"Q. Did you hear him say that? A. Then we left and the wireless received some words aboard, and those words must have been after we got off George's Bank.

"Q. Did you hear Kleb or Ducose or Bellman say where the money for the Pronto was coming from? A. Not at the time they did not.

"Q. Did you know Burt Erickson? A. Not that I saw him.

"Q. Did you hear Ducose talk to Erickson? A. Yes, I have.



*Leo Francis Murphy—For Government—Cross.*

“Q. What did he say to Erickson? A. That is what he said. He said he could not put me in the hospital and pay the bill until he got authority from LeVeque and Erickson.” Is that correct? A. Yes, it is. 397

Q. “Q. Did you hear Kleb talk to Erickson? A. Yes.

“Q. What did he say to him? A. He was trying to get advance money to fix the Pronto.” Do you remember that and was that true? A. Yes.

Q. “Kleb said the money to fix up the Pronto was coming from LeVeque and Erickson? A. Yes.” That is correct? A. Yes.

Mr. Dunigan: I think at this point I am going to object to this manner of cross-examination unless counsel can show some inconsistency between his testimony now and his prior testimony. 398

The Court: I think that objection is proper.

Mr. Cahill: The point isn't entirely clear and I will state it since the point is brought up. In this testimony at the preceding trial this witness testified that the money for repairs and the money to take care of this man when he was injured, was that the money was to come from LeVeque and Erickson and there was no other name mentioned. He is stating that is true, and bringing in of Nardone by means of this list and a hearsay matter is inconsistent. 399

The Court: I don't agree with that and I think you ought to discontinue the reading of that testimony.

Mr. Cahill: I will take an exception if the Court please.

I never mentioned this list to anybody connected with the Government not even in advance of this trial, that I can remember. I might have. I don't think anybody asked



*Leo Francis Murphy—For Government—Redirect.*

400 me for it. I was asked to state the facts I knew with respect to the Isabel H operations. I understood that I was to tell what I knew. I cannot remember that I was asked to tell all I knew about the transactions.

As far as I know I never mentioned the name of Nardone then in the course of these discussions with the Government representatives. I never met him and I never met him in connection with the Alcohol Tax Unit or any other representative of the Government that I can remember. I did not tell anybody on the stand here that I was going to mention Nardone's name here. I told Murphy about this list that somebody is said to have told me about; I  
401 mentioned the names on the list to Murphy. It was prior to my examination in December, 1936 and the statement was not taken down. No, no notes made. He asked me to come back to New York and I told him if I did come back they would grab me here. My statement is that I did mention the list to Murphy but did not mention it in this trial after that. I have not seen Murphy since. At the trial, responding to questions from the Government's attorney I said nothing about the list.

*Redirect examination by Mr. Dunigan:*

402 I said that Ducose was dead as far as I know. It came out in the paper. I saw the newspaper account. He did not die a natural death, they think he was drowned. He was on board a boat. I remember being in Mr. Dunigan's office the other day when he brought Lancaster or Mike in. I looked at him and said that was Lancaster or Mike. I had some correspondence with respect to representatives of the Government with respect to coming here to testify.

I had it in both connections with this trip and the other. At the other trial I never made a statement to Mr. Dunigan at any time as to what my statement would be. As matter of fact I refused to do so.

*Leo Francis Murphy—For Government—Redirect.*

I remember a letter I wrote to Murphy about my coming to New York to testify this time after I got a letter from him. That is a copy of the letter that I wrote to Murphy. 403

*By the Court:*

They had the list of the names of the owners of the cargo on board the boat so that in case of trouble to get in touch with them. I saw such a list on board any other rum runner. Each member of the crew did not have it. Just the wireless operator and he had a code where he could contact the owners by wireless if he got in trouble. 404

*By Mr. Dunigan:*

I know that in connection with the operations of the Isabel H there was a radio station somewhere. The wireless had an operator for the purpose of communication with the owners or the radio station. That is customary in my experience on rum-running boats.

*By the Court:*

There were six names on the list. He didn't tell me anything about a code. He told me he had a code and if they were caught he would throw it overboard. 405

He did not tell me there was any connection between the code and any name on the list. He left out my own name, and we used to talk about it all the time. He married my sister but left home.

*By Mr. Dunigan:*

I stated a moment ago that I came here to testify, having my transportation paid and six dollars a day as far

*Leo Francis Murphy—For Government—Recross.*

406 as I know about it. I never received any money from the Government after that. As matter of fact, when I left here I owed the Government fifteen dollars. That was because I could not be paid for certain days until I got back to Wedgeport.

I sent that \$15 back through the American Consul. On this trip I received \$25 from the American Consul. The last time I answered all the questions that were asked me I did not tell all I knew. I only answered the questions asked me. That letter refreshed my recollection with respect to why I should tell you more this time.

407 I have answered the questions asked me this time, and my testimony on the stand is true. I didn't own any part of the cargo, I was just an employee.

(Mr. Cahill: I will read the letter if you wish, I will read it in evidence. This is the letter to which you refer. Your letter dated February 13, 1939, addressed to Mr. William T. Murphy, Boston, Massachusetts. Dear Mr. Murphy: Received your letter stating I had to be in New York on or about February 21. I wonder if it would be possible for you to inform me the exact date I must leave Wedgeport as I would not like to start a job and not be able to complete it before I was called. This time I am ready to give all information I possibly can, as I still think the owner of the Isabel H did not give me a fair deal. If I have to leave Friday, the 17th, to get there the 21st that wouldn't leave very much time, so send me a telegram stating when I must leave. Addressing it, and so forth. Signed Leo Murphy.)

408 *By Mr. Cahill:*

I was not subpoenaed, except the American Consul called me up and told me I was to be in Boston. I was not subpoenaed in response to that letter as far as I know.

*Leo Francis Murphy—For Government—Redirect.  
Ephraim Zoole—For Government—Direct.*

409

*By Mr. Dunigan:*

I do not know whether it is possible to subpoena a man outside of the United States.

*By the Court:*

I would pay attention to it if you got one up there. I testified last time about LeVeque and Erickson as Mr. Cahill read for the record. I do not know whether LeVeque or Erickson was on trial in the last trial, I don't know which one. I am sure.

410

(Short recess.)

EPHRAIM ZOOLE, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

I am a Lieutenant-Commander, United States Coast Guard, presently stationed at Cleveland, Ohio. In January, 1936, I was commanding the United States Coast Guard Cutter Yamacow. I saw a boat called the Pronto on the evening of January 20, 1936. The rum runner Pronto was seized by the Coast Guard Cutter Yamacow about seven and a half miles from the coast of South Carolina.

411

The vessel was brought to after firing blank shots, the vessel surrendered and was towed into Charleston by my command. I saw the members of the crew on that occasion. Harold Conrad was the master, Percy Wallace who is also known as Van Austen, Michael Seitz.

Michael Seitz is known as Lancaster. Mahe, Peter Romain and a man by the name of Martin. At the time the



*Raymond J. Mauerman—For Government—Direct.*

412 Pronto was seized it had a cargo aboard of approximately 800 cases of grain alcohol. The cases were similar to Government's Exhibit 32 for identification.

I heard the witness Brown testify. I gave him orders. Brown was the custodian at Charleston and the cases were put in his custody and a few cases particularly I told him to mark and hold for evidence in any subsequent trials.

I have seen Government's Exhibits 43, 44 and 45 in evidence similar to them. These seals are similar seals that were on the cases of grain alcohol seized from the Pronto. Same wording was on the seals, "Belgique." These are from cases that were on the Pronto. (Government's Exhibit 32 for identification received in evidence.)

413 (Mr. Cahill: We move to strike out the testimony of this witness and the witness preceding, about whom we have not made any motions. If your Honor prefers we will make our motions at the end, on the ground on which we made our motion as to Geiger.)

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RAYMOND J. MAUERMAN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

414 *Direct examination by Mr. McKnight:*

I am Lieutenant-Commander, United States Coast Guard at present stationed at Lake Michigan. I have been in the Coast Guard service 20 years.

On February 26th I was commanding the United States Patrol Boat Icarus from the station at New York. In connection with that boat I participated in the search of the boat Isabel H about the time in question. The Icarus was directed to keep the Isabel H under surveillance while she was at St. George, Bermuda during the period from Feb-



*Raymond J. Mauerman—For Government—Direct.*

ruary 26th to March 13th, and finally she escaped on the evening of March 13th and was lost to the Icarus. 415

She attempted to elude our surveillance while we were watching her at St. George. She left port and we followed her out and the crew proceeded to fish and came back in again. I believe that happened twice. Then on the 13th we followed the boat out and did not even find the boat fishing.

I met the defendant Harry Ducose. Several times I talked with him. We discussed the operation of the boat. Naturally I tried to get all the information I could. He told me among other things there was no more money in running alcohol and that he was going to get out of the business. 416

He told me he was running alcohol. That was the gist of the conversation, that there was no more money in it. He said his cargo had been placed ashore under the control of the customs authorities in Bermuda and he was anxious to get rid of it and arrangements were being made for another boat to come down there to take it. I don't recall that he told me what that cargo was. I assumed that I knew. I don't recall that I asked him. I never did see any of the cargo.

I had further conversations with him concerning the cargo or his business. I talked to him several times and that seemed to be the gist of the conversation. While there I took photographs of the Isabel H. I recognize Government's Exhibit 51 marked for identification. That photograph was taken by one of the officers under my command at my direction and I noted the printing shown on the photograph. That is in my handwriting. 417

It is a picture of the Isabel H showing Ducose, and several members of the crew of the Isabel H. (Government's Exhibit 51 for identification received in evidence.)

*Raymond J. Mauerman—For Government—Cross.*

*Adolph Stenfeldt—For Government—Direct.*

418

Government's Exhibits 52 and 53 in evidence are pictures taken by the men of the Icarus while keeping the Isabel H under surveillance and were taken at my direction.

*Cross-examination by Mr. Climenko:*

In 1934 I was in command of the—part of the time I was in command of the shore and part of the time in command of the Upshur. Specifically in 1934 I was stationed in New York, Pier 18, Staten Island.

419

I did not know Lancaster while he was in the Coast Guard service. He was a telephone lineman, as I understood the other day. I would have nothing to do with a telephone lineman. I had never seen him before seeing him in this Court.

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ADOLPH STENFELDT, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

420

I know a man by the name of Pierre LeVeque for ten or twelve years. Government's Exhibit 41 in evidence is a photograph of Pierre LeVeque. I live in Montauk. I have a hotel. I have owned boats years ago. I couldn't exactly say if I saw LeVeque in February, 1936, but I seen him some time in 1936 or 1935. I couldn't say where it was, I know he was out there some time in 1936.

He came out with another man in the car. I did not notice the car coming and what kind of car it was nor the license plates on it. On that particular occasion Mr. LeVeque came into the kitchen and said he had a proposition

*Adolph Stenfeldt—For Government—Direct.*

if I was interested in a proposition. He called me previously 421  
to that on the telephone and I told him I am not absolutely  
interested in a proposition and there is no use talking to  
me about it.

He did not tell me the nature of the proposition. He told  
me that he wanted me to freight some goods by boat for him  
in connection with the proposition. He did not tell me  
where the goods were, and I did not ask him.

I remember testifying at the last trial in December of  
1936. After looking at this document that sentence that  
Mr. Dunigan just read to me does not refresh my recollec-  
tion with respect to the time when LeVeque came out to  
Montauk to see me. I read this question and my answer. 422

It would not help me any, bearing in mind that I tes-  
tified in December, 1936, and bearing that in mind it does  
not help me any with respect to the time when LeVeque  
came out. I know I was here on the trial, February 13, and  
I was here in December, 1936, testifying. I was asked if  
he did not come out on February 13 of that year but I don't  
know if it was the same year. I don't remember if it has  
been about February of 1936 when he came out.

I don't remember anything else. Mr. LeVeque said he  
had a proposition and I told him I was not interested in  
any proposition whatsoever, and he stayed there about five  
minutes and he left and went back to New York. I told 423  
him I was not interested in any proposition. I did not know  
the nature of the proposition. I had had dealings with  
LeVeque before. I had no business dealings with him in  
1935. I did not know this other person that came out with  
LeVeque nor did I talk to him at all.

I wouldn't recognize him if I saw him. When LeVeque  
spoke to me on the telephone it must have been once before  
he came out. I did not recognize his voice. I would not  
have known it was LeVeque if he had not told me so. I do  
not recognize that photograph (handing).

*Adolph Stenfeldt—For Government—Cross.*

*Edmond Parrot—For Government—Direct.*

424

LeVeque did not tell me how much it would be worth to me if I went along with him on this proposition. We didn't talk about any propositions whatever. I answered him short and told him I was not interested in any proposition, and that is as far as our dealings went. He said there is no use of me talking to you then. I said no, and he went back to New York.

He wanted me to bring in some freight on a boat.

*By Defendant Brown:*

425

(Mr. Cahill: I am not going to cross-examine the witness. I wish to make the same motion and the same offer of proof with respect to the testimony of this witness and I am moving to strike out this testimony.)

(Mr. Dunigan: I think we ought to say, Mr. Cahill, once and for all, that I am not limited to bringing out conversations of these particular defendants. If I show a man up in this conspiracy and connected it with the defendants I think his testimony under all rules of evidence is admissible and competent.)

426

New York, March 15, 1939.

EDMOND PARROT, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

In the early part of 1936 I was in the restaurant business at 324 West 46th Street, the name was The Lion of Belfort Restaurant. I know Pierre LeVeque. This is a photograph

*Edmond Parrot—For Government—Direct.*

of LeVeque (indicating). I know a man by the name of 427  
Saunders. This (indicating) is a photograph of Saunders.  
I don't know anything about his name. I called him Red  
or Bud.

I recognize Government's Exhibit 57 for Identification.  
I don't know his name. I never knew his name. I saw him  
in my restaurant in January and February, 1936. I saw  
the person shown in Government's Exhibit 1 in evidence a  
couple of times. I don't know his name. I heard of Big  
Bill; that is a photograph of him. I do not know his last  
name. At any rate, I know it is Big Bill. I saw Saunders  
or Red very often. This was in January and February of  
1936. He started between the 10th and 15th of January, 428  
1936, till the last day. I had never seen Saunders before  
that time. I had not seen this other one (Government's Ex-  
hibit 57 for Identification) that I recognized before Janu-  
ary 15, 1936.

I did not see Big Bill before January 15, 1936, not be-  
fore January. I knew Mr. DeVeque about a year before  
January 15, 1936. I met him four or five times before that.  
But I didn't know these other men. The only man I saw  
in 1935 was Mr. LeVeque.

Now, beginning January 15, 1936, I never saw these  
persons whose photographs I have identified at my place.  
I stated a moment ago that these people whose photographs 429  
I identified came to my place between the 10th and 15th of  
January. They came between eleven or two or three o'clock  
in the afternoon; they came for lunch, sometimes at one  
o'clock, sometimes half-past one or two o'clock. After Jan-  
uary 15th they were there at least four days a week—not  
every day. Sometimes they stayed half an hour, sometimes  
three hours.

I had a pay station telephone booth there. I saw LeVeque  
use that. All the time he came there he used the phone.  
No, I don't remember, I don't think I saw Red and Big Bill



*Edmond Parrot—For Government—Direct.*

430 use the phone there. The other person that came there with Mr. LeVeque and Bill and Red was Mr. Frank. Mr. Frank must be Mr. Nardone. I would recognize Mr. Frank if I saw him now.

(The witness leaves the stand and goes to the center of the courtroom.)

There is Mr. Nardone (pointing). I know the next one in the row; I don't know his name. I know the next one; I saw him once. I think it was in my place. I mean the third one.

431 Mr. Dunigan: I would like to have the record indicate that the witness is indicating the defendants Nardone, Hoffman, Gottfried.

I saw the third one on the last day; it must be the 22nd of March. On that day I see two men coming to the place and they go in the back of the restaurant and some other one came in and they arrest them. There were four that day, I guess.

432 Mr. Frank did not start coming to my place until about the same time as the others. Mr. LeVeque gave my cards of the restaurant and he, Mr. LeVeque, came the first time in December, Christmas day of 1935, and the second time, if I remember, he came with Mr. Frank. Mr. Frank came into my place after January 15th, the same time Mr. LeVeque, four or five times a week. They would talk together sometimes one or two hours. Once in a while they would also use the telephone booth to make calls and receive calls.

Sometimes Red and Big Bill had lunch at the same table. There was only one telephone booth in my place. Sometimes I answered the phone; sometimes my partner, when I was out. During the period after January 15th when LeVeque, Frank, and the others were there, calls would come

*Edmond Parrot—For Government—Direct.*

in there for them, a couple of times every day; I didn't put any attention on that. The calls would come in a couple of times that they were there. Sometimes they answered the phone, if they expected a call; sometimes, if I was out, my partner answered the phone.

They came there four or five times a week each week after January 15th and up to March 22nd, and they would generally leave about the same time. I don't know if it was February or March that Mr. Frank told me if my sister calls just say I am going to Montauk. That was during the period after January 15th and between that and March 22nd. He did not tell me who he was going to Montauk with, but Mr. LeVeque was there.

I think this conversation between me and Frank was in the presence of Mr. LeVeque. All he said was, if his sister calls to say I am going to Montauk. I cannot fix the date of that conversation with Frank. Mr. Frank told me that when they were leaving the place.

I don't remember how many times I have seen this second person there at my place—not very often. It is hard to remember if he came alone or with some other person. He was there when LeVeque and Frank and Red and Bill were there. I saw him together with those people, all in one group. They would be talking together. They usually sat or stood in the corner on the left, a table there for four or five people. The telephone was across on the right.

I know this gentleman (indicating). I saw him around my place four or five times. I saw him inside in the restaurant—in the bar. I think he had a lunch once. I do not know this gentleman's name. I saw him in a car outside my place with, I think, a Virginia license plate. I came back in the restaurant and took the license plate.

I told Mr. Frank and Mr. LeVeque, they were together, I think there is a man in your car. That is what I was thinking that day. I know Mr. Frank had a car; he usually drove to the place in a car. I never saw the license plate on that car.

*Edmond Parrot—For Government—Cross.*

436 I told Mr. Frank and Mr. LeVeque a man who was here the other day I think is in your car now. He said: What license? I gave the license number and Mr. LeVeque and Mr. Frank went out and looked in the car.

I wrote the license number on a piece of paper. I was going to buy the meat and vegetables for the restaurant, and that is how I seen the car. I don't remember which one I gave it to; I put it on their table there. Only a couple of times I heard they were talking about 300 or 400 cases, and I don't know what it was.

*Cross-examination by Mr. Cahill:*

437 I don't recall now who was talking about those cases. I don't recall anything that anyone said to the other, only what I think, it was about three or four hundred cases, Mr. LeVeque and Mr. Frank. I couldn't say who said what, that one said this and the other said that. I was surprised, and that is why I asked who it was and they said brandy and I buy a case of brandy from Mr. LeVeque. I got the receipt for the restaurant, regular brandy. I think LeVeque was in that kind of business because I bought a case of brandy from him. The brandy that I bought was marked tax paid, everything paid, the stamps and everything.

438 When I bought this tax paid brandy, it was right after the conversation when I heard the liquor referred to, it must be in March or February. That is the only case I bought from Mr. LeVeque.

I did not know that Mr. Nardone had relatives on Long Island. I never heard that. I said his sister was referred to that was going to make a telephone call. LeVeque did not talk to me about going to Montauk. Mr. Frank did. Mr. LeVeque never did.

*Edmond Parrot—For Government—Redirect—Recross.**By Mr. Halle:*

439

I was asked about the man here, the defendant Robert Gottfried. I operate a restaurant there where people come in to eat. It is a public place. And this defendant Gottfried came into my restaurant there. I know he came, I don't know if he eat, I don't remember. I cannot say how many times he was in my restaurant. He came by himself. He came in the restaurant and ate his meal the same as any other customer. He paid his bill and went.

*By Mr. Climenko:*

440

I said that I had seen the third man sitting there in that row, I think I saw him. I cannot remember when, I think it was the last day, the 22nd of March, if I remember, I won't swear on that. I swear I saw that man in my place and I don't know when.

*By Mr. Dunigan:*

It was during that time when LeVeque and Frank and Bill Big and Red were in there that I saw the third man. If I remember, he talked with LeVeque and Frank.

*By Mr. Climenko:*

441

I do not know what they talked about. I do not know whether they came in together; they were customers, and that's all I know. He just walked in like any other member of the public. My restaurant is at 324 West 46th Street.



*Bernard C. Cooper—For Government—Direct.*

BERNARD C. COOPER, called as a witness on behalf of the Government, being duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

I live at Wildwood, New Jersey. I know Pierre LeVeque about seven years. I recall seeing LeVeque in the early part of February, 1936; exactly, I don't know. I saw LeVeque on that date in the Pacific Hotel, Wildwood, New Jersey. I did not see him alone, he had another gentleman along with him. I can identify him if I look around. He is the first gentleman in the first row (indicating the defendant Nardone). I had a conversation with LeVeque on the occasion of his visit in February. About three days previous to that he left a note at my house to call him in Atlantic City. I called him and made arrangements to meet him in Wildwood. Later we met in the Pacific Hotel. I had the appointment to meet him there. The conversation led on if I knew someone I could get to bring some goods in; he had had a lot of trouble on the Coast and if I knew a boat owner that could bring it in. I said I would try to help him out. I left then to go to Cold Spring Harbor to see if I could pick this boat up. I left then to go to Cold Spring Harbor, about four miles out. I believe I borrowed Mr. Nardone's car, a brand new car, according to my recollection—it was a Pontiac—to go there. He told me I could have his car. I think I told you all the conversation before I left to go to Cold Spring Harbor. He didn't say what kind of goods to bring in. I think he said the goods were about 50 miles outside, Jersey waters.

He did not tell me the trouble he had on the coast, just said he had a lot of trouble. I went down to Cold Spring Harbor to find this skipper, but couldn't find him. I made arrangements with an ice place to get this skipper this time. I left word with this engineer to contact the skipper of the boat to bring him to the Pacific Hotel and meet Mr. LeVeque.



*Kje L. Nilsson—For Government—Direct.*

In about an hour he showed up. LeVeque and the skipper of the boat went in the office. What they talked about I don't know. 445

Nardone was sitting in the upper room with me, talking, just talking, just talking about the weather and like that. From Wildwood, New Jersey, I mean towards New York when I said up the coast. I believe I have told you everything that happened and all the conversation I had with LeVeque and Nardone. After the skipper and he came out, I believe he said the boat was too small, that he couldn't use it. To my recollection, the license tag was Atlantic County, New Jersey. Prior to this visit of Mr. LeVeque I had some dealings with him. 446

(No cross-examination.)

(Adjourned to March 16th, 1939, 2 P. M.)

New York, March 16, 1939,  
2 P. M.

*Trial Resumed.*

KJE L. NILSSON, called as a witness on behalf of the Government, being duly sworn, testified as follows: 447

*Direct examination by Mr. McKnight:*

I am sales engineer for Atlas Diesel Engine Corporation. That corporation consists of supplying engines and parts. I recall an order received in 1936, in which I received an order for a boat called the Pronto. Government's Exhibit 37 for identification refreshes my recollection as to the time when I filled this order. I don't recall the circumstances, just how the order came in. It might

*Valentine Strumill—For Government—Direct.*

have been ordered over the telephone. My instruction concerning that order was to prepare it and deliver it to the airport at Newark, New Jersey.

Yes; I told them we could not do so unless we had payment in advance. I was told to get in touch with a certain telephone number, Mr. Durand. After that I asked our stock clerk, Mr. Strumill to prepare the order for shipment. Government's Exhibit 40 for identification is a similar order for that which I filled. That is also for the Pronto. That order was given on January 7, 1936, according to the date of the order. The day before the prior order I just testified about.

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VALENTINE STRUMILL, called as a witness on behalf of the government, being duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

I am the stock clerk in charge of the stock room of the Atlas Diesel Corporation working under Mr. Nilsson. I heard him testify in respect to the orders for the Pronto. I filled these orders. Government's Exhibits 37 and 40 for identification are the orders that I filled. I just prepared these orders and someone called for them and I turned them over to him. I cannot see the person who called for these orders in the Court room. I wouldn't know if Government's Exhibit 41 was the person who called for the orders, I don't recognize that.

(Government's Exhibits 37 and 40 for identification received in evidence.)

*John McAdams—For Government—Direct.*

JOHN MCADAMS, called as a witness on behalf of the Government, being duly sworn, testified as follows: 451

*Direct examination by Mr. McKnight:*

I am presently incarcerated in the Leavenworth Penitentiary at Kansas. I know a person named Pierre LeVeque. I met a person named Frank Carmine Nardone at one time. There is a man in the court room that could be him; I am not exactly positive. The gentleman in the first seat here of this row against the rail (indicating the defendant Nardone). That is the man, as near as I can recollect, from the time I was in his company. I first met him some time in March, 1936. I met him through a telephone call from Pierre LeVeque. LeVeque wanted to meet me to have a conversation with me, the arrangement was made for the meeting at the West Shore Ferry, 42nd and North River, and I met him there. He was with this man here (indicating) Nardone. He introduced me to Nardone. I asked him, "Who is this party with you, LeVeque?" He said, "This is my partner." 452

LeVeque wanted to know if I would go somewhere and have a sandwich or a bite with him. I told him yes, there was a place at 47th and 11th Avenue where all the Customs men met and we could go there, and LeVeque said no, he didn't want to be seen around the place, as he was known over there. He then had a conversation with this man. Then LeVeque asked me if I would go any other place. I said yes, I had to go back to work. I was then a sergeant in the Customs Service. The three of us got in a taxicab and proceeded to a restaurant and cafe at 46th and Eighth Avenue. I don't recall the name. 453

We went in, had a sandwich, I then asked LeVeque what he wanted to see me about. The conversation took place around the table between myself, Nardone and LeVeque.

*John McAdams—For Government—Direct.*

454 Mr. Cahill: Without going into it in detail, the same objection is made to this testimony as with respect to the testimony of Geiger, based on the source of information, and the same offer of proof is made with regard to the source of the information.

I had known LeVeque for quite a number of years and he had apparently disappeared for a couple of years, and the first thing I asked him was, "Where have you been?" He said, "I have been away; I have been down south." I said, "What did you want to see me about?" He said, "Well, I want to find out about some stuff coming in." 455 Nardone was present when this conversation took place; the three of us were sitting around the table. I said, "What do you mean?" He said, "We have three truckloads of alcohol coming in." I said, "What's the idea of bringing alcohol in now, what's the sense of it? Don't you know prohibition is over?" He said, "That is one of the things we want today." I said, "You haven't a Chinaman's chance of bringing that in." He said, "Why?" I said, "For the simple reason you can not get it in." Then Nardone whispered to LeVeque and asked about the workings of this harbor squad there. I said, "The Harbor Squad is working day and night. Our own office is working day and night, and other divisions are working day and night. I don't see any reason why you want to bring that stuff in." 456 I said, "Why do you ask me this, you haven't asked me this before?" I then advised LeVeque not to bring the stuff in at all.

He said something about having had it shipped. It was at that time he said—I said, "How are you getting this stuff in anyhow?" He said, "We got it coming in on a boat." "What's the name of the boat?" He said, "We will pass that up." I said, "When do you expect this boat to

*John McAdams—For Government—Cross.*

come in?" He said, "I don't know that either, but it will be within a very short time." He then asked me could I advise him or would I advise him whether the stuff could be brought in on the East River or North River. I told him I positively could not advise him, that I would not advise him. 457

I said, "I can not get the idea of this alcohol coming in at this time." He said, "Do you read the newspapers?" I said, "Yes." He said, "Did you read about a boat being chased in to Bermuda by the Coast Guard?" I said, "Yes." He said, "That's the alcohol." LeVeque said, "We had trouble down south and the boat got chased." Nardone did not speak at all in the conversation only the one time when he said, "Find out how the boats operate." He whispered to LeVeque. I had no conversation with Nardone whatsoever. However, all of this conversation that I related with LeVeque was around this table. That is the only place we had any conversation, was around this table, which left it about half to three-quarters of an hour. It is a small ordinary table like they have in cafés. We were close together. 458

I couldn't say if I saw this particular article (shown to him), but I did see an article about a boat getting into Bermuda and escaping through a fog or something. 459

*Cross-examination by Mr. Cahill:*

I didn't testify at the other trial. I have been in the penitentiary three months. I came up here last Sunday morning in preparation for going on the stand. I have not been up here before I was incarcerated. Only on one other occasion. I only spoke then to the grand jury. I didn't speak to the assistant district attorney. I had no conversation with him. I was ushered right into the grand



*John McAdams—For Government—Cross.*

460 jury. I didn't even know where I was going. I was in the Customs Service about thirty years. That service ended at the time of this happening; in March I was suspended. I was dismissed about three or four months later. There was no trial; what they call a personal hearing down at the Customs House, and I was dismissed on charges for associating with bootlegging in this case here.

I know LeVeque for a great many years—about ten years. It was after prohibition went into effect. That is when I came in contact with him along the waterfront. During the time when the prohibition law was in effect I at some time made contact with him. I was not introduced to him. 461 I met him around the waterfront. I never saw Nardone in my life until I saw him there. There was a picture shown me yesterday that the government wanted identified. I don't know who it was. I did not identify him.

I have not seen some of the defendants around the hall or in the court room here since Sunday. I have been up in the Detention House. I have not talked with any assistant except Mr. McKnight. He asked me what I knew about the case, and I told him I got acquainted with it in March, 1936, and I told him if I had a copy of my testimony before the grand jury I could freshen up.

462 I saw a paper of the testimony before the grand jury. I stated there was a man in the court room that was with Nardone. Let Mr. Nardone stand up. I can say with certainty the man I saw with LeVeque was Nardone. I know LeVeque. I could identify them by size. I could not only identify him by size, I could identify him while standing at the West Shore Ferry and walking over one block. That was the only time I had to see Mr. Nardone.

I rely on the relative sizes of the two men. I wouldn't want to say for sure that was the man I saw with LeVeque, but something tells me that is the man, and that is all I can say about the identification. He took no part in the

*John McAdams—For Government—Cross.*

conversation with me, whoever this man was. The only part he actually did speak was when he asked about the Boat Squad. 463

I didn't say the statement that all he did was to whisper. He did whisper on three or four occasions into LeVeque's ear and LeVeque would ask me some questions. This other man, whoever he may be, made some statement to me directly. He spoke to me directly, "How about the Boat Squad?" and that was all.

We were arranged around the table. Say, this was the table, I was sitting here and LeVeque there, and the other man on the other side. I imagine it was a round table, I am not sure. I was here and LeVeque next to me and this man on the other side. LeVeque was in the middle between me and the other man. The restaurant was at 46th Street, 456 West of 8th Avenue. 464

I first made the first statement about a meeting between the three of you to any representative of the government when I was called to the grand jury. I don't recall when that was. It was not prior to the first trial. I don't recall when the first trial was.

My best guess without pinning me down to the precise date as to the time when I went before the grand jury is that it was later than that. I don't think it was during this year. Probably it was some time the latter part of last year; I am not sure about that; before Christmas Mr. Dunigan, I think. I think it was through Mr. Martin, the district attorney. 465

Mr. Martin called me down to his office and there I met Mr. Dunigan, I am not sure about that. That was before I went in to serve my sentence. I am serving a sentence for seven years for smuggling narcotics. The gentleman on the end was connected with me in that. Nardone had nothing to do with narcotic smuggling. There were so many charges, bribery I imagine, conspiracy and smuggling. I

*John McAdams—For Government—Redirect.*

466 was not tried. I pleaded guilty against my will, because I thought I was not guilty of it.

I did not tell that to the representative of the government. I told that to Mr. Martin, and he accepted my plea. I absolutely am old enough to know what I was doing and I pleaded guilty. I had counsel. I began to serve my sentence in November. There is no other accusation pending against me that I know of. I have not discussed recently with the representatives of the government the sentence imposed on me in that case. I have not discussed the question of applying for parole in the case through the regular channels—the questions I was asked at the penal institution.

467 I am not expecting something for my testimony here. I have no hopes in that direction. I love my wife and family. I naturally hope that my testimony here may help me. I haven't asked for any. I want to get back for my family. I do have some hope. (The person identified by the witness during his cross-examination was the defendant Erickson who pleaded guilty.)

*Redirect examination by Mr. McKnight:*

468 I began my sentence in November, 1938, this past November. I was sentenced at that time, and it was prior to that I went before the grand jury. No promise has been made to me for giving my testimony here, none by nobody.

Witness excused.

*Walter F. Martin—For Government—Direct.*

WALTER F. MARTIN, called as a witness on behalf of the government, having been first duly sworn, testifies as follows:

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*Direct examination by Mr. Dunigan:*

I am presently connected with the federal government as special investigator, Alcohol Tax Unit. I have been in the government service since 1929. In February of 1929 I was stationed in New York City under the supervision of the Alcohol Tax Unit.

I know the defendants Frank Nardone, Nat Hoffman, Gottfried, Callahan, Brown, Bert Erickson. I know Pierre LeVeque, George Geiger and Red Saunders. In February of 1936 I was assigned to make a note and observe persons entering and leaving the Belford Restaurant on West 46th Street.

470

In connection with that assignment I went to the vicinity of that assignment. I had a car, license plate was of State of Virginia. My best recollection as to the first date that I went to the vicinity of the Belford Restaurant would be on February 12, 1936. I have some memorandum to that effect. I keep a daily memorandum of my activities, and what I observed.

○ I have the original notes in my possession. I can write shorthand; most of them were taken in shorthand. I transcribed them two weeks later. I have the transcript in my possession now.

471

(Mr. Cahill: The same motion is made with respect to the testimony of this witness, as with Geiger and the same offer of proof is made. I intend to ask some questions on that line, if your Honor will permit me to do so.)

I kept the Belford Restaurant under observation approximately a month. The last day that I was there for any length of time was on March 2nd. I made several trips

*Walter F. Martin—For Government—Direct.*

after that, just passing by for a few minutes, and not staying there long. During the period between February 12th and March 2nd I saw LeVeque, Nardone, Gottfried, Hoffman and Red Saunders in the restaurant.

I don't think I saw Erickson. Nardone was there practically every weekday. He may have missed one or two days, but he was there practically every week day. LeVeque was the same. I believe I saw Red about twice. George Geiger was there almost daily. On those occasions that those people were there I saw them conversing together.

When I saw, Nardone, Geiger and LeVeque, I saw them conversing together. I did hear some of the conversations. LeVeque, Geiger and Nardone came there between 11 and 12 o'clock. The time they remained in the restaurant. Sometimes they would stay as late as 5:30 in the afternoon. I was in the restaurant on occasions when they were in it; they usually set themselves if they were seated in the restaurant at a little table in the corner on the left hand side as you go in; there was a pay station in that restaurant. I did not see Nardone, LeVeque or Gottfried or any of them use that pay station; I did not. I was only in there on short periods. I would go in and get a sandwich or glass of water and come right out. But I was able to decide, to determine, how long they remained there. Referring to Nardone, LeVeque and Gottfried, Nardone practically always came in a car. Sometimes LeVeque came with him. Geiger usually walked. Hoffman walked. Gottfried walked coming to the restaurant.

On the occasions when Nardone, LeVeque and Geiger were there, Hoffman was there on several occasions, and he would be in there conversing with them. More often they came out together than going in together.

As well as I recall he had a 1936 Plymouth coupe, black. It was a Hudson County, New Jersey license. I believe the number was H65,330, New Jersey. I am positive of that.



*Walter F. Martin—For Government—Direct.*

I saw the defendant Gottfried in the Belford Restaurant, at least once during this period that was prior to March 20th, he came to the restaurant alone. On that occasion LeVeque, Nardone, Geiger and Hoffman were present. I could not observe whether or not Gottfried joined that group. I was not in the restaurant while they were inside but they came out together and walked to the corner, the five of them, corner of Eighth Avenue and 46th Street, and I believe LeVeque and Nardone got into Nardone's car and left the other three, Gottfried, Hoffman and Geiger, walked toward the subway entrance. 475

I stated that on some occasions I would go into the restaurant and order a sandwich or something like that. 476

I saw the witness Parrot on the stand yesterday, I recognized him as the proprietor of that restaurant. I overheard conversations between LeVeque and Parrot inside the restaurant. The conversation was in French; I didn't understand it, at that particular time I observed a small white pad on the bar and it had my license number on it, Virginia license 186,404. I heard the witness Parrot testify concerning that yesterday.

Immediately after this conversation between Parrot and LeVeque, Nardone came out of the restaurant. I walked out and walked up the street towards 9th Avenue passing my car. He walked very slowly. He crossed the street and came down the other side, still looking at my car, and re-entered the restaurant. I followed him out when he left the restaurant. 477

I had occasion to go to the Belford Restaurant on or about March 20th.

They were Special Investigator Heins; an officer by the name of Goin; United States Marshal Gibson; Custom Officer Pike, and a city police officer, Arlington (handing the memorandum to Mr. Dunigan).

*Walter F. Martin—For Government—Direct.*

478 On the occasions when I saw LeVeque and Nardone and Geiger and Hoffman in the restaurant I don't think I saw them eating at any time. On one occasion they had some drinks in front of them.

But I never saw them at this table dining at any time that I was in there.

On March 20, 1936, when I went there I saw the defendant Nardone, Geiger and Saunders and a man by the name of Velez were there. Gottfried came in about ten or fifteen minutes after we arrived, ten or fifteen minutes later. LeVeque and Nardone and Geiger were placed under arrest as well as Saunders. I did not interrogate any of those  
479 four persons that I have just named on that day concerning their activities. He started over toward the table where the men were sitting. The men we had just placed under arrest, were sitting around and walked over and took a seat at another table a few minutes later, probably five or ten minutes later he went to the men's room. Nardone went to the men's room on two occasions while we were there on March 20, there was no exit to the men's room, I mean outside. No way of getting in or out, just a small window there. Probably he couldn't get out of there.

Mr. Dunigan: Mark this for identification.

480 (Marked Government's Exhibit 58 for Identification.)

I recognize Government's Exhibit 58 for identification that piece of paper attached to this. That piece of paper was turned over to me along with some others by Customs Officer Pike on March 20th, yes, he turned them over to me.

He came out of the men's room with those in his hand dripping water, he immediately turned them over to me. And I observed the water on them, they were pretty wet.

*Walter F. Martin—For Government—Direct.*

Pike turned over to me more than fifty altogether, including a small memorandum. I examined the papers he turned over to me. 481

Government's Exhibit 59 for identification, referring to the card on the sheet that was among the papers that Pike turned over to me. At the same time and place.

Also Government's Exhibits 60 and 61 for identification. I handled all the exhibits there at the restaurant that day. I have a memorandum in my pocket. On March 20th when I was in the Belford Restaurant I saw LeVeque stand up first when everybody else—when the officers came in he stood up with the other defendants and was frisked to see if he had a gun and took a seat at the table where he was sitting. There was quite a little commotion when the officers came in. Some minutes later I saw him fumbling in his pocket and when he was called up to the front of the restaurant and searched, there were some papers on the floor beside his chair which were picked up and put into an envelope. I examined those papers. I think I would recognize them if I saw them now. Government's Exhibits 62, 63 and 64 for identification are some of the papers that I just referred to. They are all included in the papers that were found by LeVeque's chair. 482

(Government's Exhibits 62, 63 and 64 for Identification received in evidence.) 483

(Government's Exhibits 62, 63 and 64 were read to the jury.)

Mr. Dunigan: Mark this Government's Exhibit 65 for identification.

This envelope, Government's Exhibit 65 for identification, are among those turned over to me by Mr. Pike that were wet and come from the men's room. I testified at the last trial that it was my recollection those papers had been turned back to Gottfried. That was my recollection at the

*Walter F. Martin—For Government—Cross.*

484 time though I was mistaken in that, they have subsequently been found and are produced here.

I first met defendant Austin Callahan about the 21st or 22nd of March, something like that, 1936.

I recognize Government's Exhibits 66 and 67. I do know the handwriting on those two exhibits. The line at the top on this one, Government's Exhibit 67 for identification, is Callahan's, below that is Mr. William E. Dunigan and Major Yandel, in charge of the Intelligence Department of the Coast Guard here in New York City at the time, this writing at the top was done in my presence, the writing I have identified as Callahan's. In Government's Exhibit 68. The line in the middle of the page is Mr. Callahan's. The writing below is Mr. Dunigan's and my signature and Commander Yandel's signature.

485 By comparison with the Exhibit 66 I would say the handwriting in Government's Exhibit 69 for identification was Callahan's.

*Cross-examination by Mr. Halle:*

Once I recall particularly, I saw Gottfried at the restaurant. It was toward the later part of February, probably the 28th. I think I made a note in my memorandum book that I saw him on that day. The whole month was cloudy, rainy and snowy. I observed Gottfried around lunch time, probably one o'clock. I was about 3 or 4 car lengths away from the restaurant entrance. On that particular day I wouldn't recall on which side of the street; at the time he went in I believe I was on the south side of the street. The restaurant is on the south side of the street. I mean to say I observed him walking in. I saw him coming out later with the others. When he went in he went in alone. I never saw him before, to my knowledge.



*Walter F. Martin—For Government—Cross.*

I saw other people walking in too that day. I noticed everyone that went in, made a particular note as to how long they stayed and when they came out; each and every person that went in and made a mental picture of them. Persons who came out in two or three minutes, apparently had gotten a beer, I didn't try to recall their faces, I have forgotten. When they went in I didn't know how long they would stay. I mean to say as to every one who went in I made a mental note of their faces and their approximate weight and height. Just from recalling persons who went in, that was sufficient to enable me to remember their faces. I was about three or four car lengths from the door on this particular occasion.

When he went in I was to the west; when he came out I was to the east. I had Gottfried under observation just before he went into the store while he was walking from the corner of Eighth Avenue and 46th Street, a distance of about 100 feet, he was walking a natural gait. I remembered he was the same person I had observed go in some time prior. He was in the store probably an hour, a little longer. I didn't have him under observation while he was in the place. When he went out four other men walked out at the same time, I think two went in the car, and three of them walked on. They were walking together. I could not hear them talking, I could see their mouths working.

I don't know whether they were tongue-tied or talking. They were talking. I didn't hear them, I was across the street. There were probably one or two cars parked along there obstructing my vision.

When I saw them walking out to the street I was standing near the little restaurant that is on the corner of Eighth Avenue and 46th Street, at a diagonal line across the street; that would be about 150 feet from the restaurant.



*Walter F. Martin—For Government—Cross.*

490 I saw them come out of the restaurant, three people, they were 150 feet away and they walked towards me. They were talking to one another.

Referring now particularly to Gottfried he had on, as well as I remember, a dark overcoat and a grayish hat. I don't believe I made a note or memorandum of that. I do not recall that anyone went out immediately after those five men walked out. I do not recall now who went out before those five men went out. I do not recall now, who walked in ahead of Gottfried nor do I recall now who walked in after Gottfried walked in; yet I said a few minutes ago everybody who walked in there I made a  
491 mental picture of. As I said a while ago if a person went in and came out immediately I immediately forgot them, unless I had seen them associated with some of these other men on a prior occasion. I had not seen Gottfried on a prior occasion that I know of, so when he walked in I did not know who he was. If he had walked out immediately I would have forgotten him immediately. When he walked in, I didn't know who he was, and there was nothing special to call my attention to him.

Q. So you forgot about him immediately? A. No.

I do not know anybody else who walked in before or after him at that time. I don't think there were any other persons who walked in on that day other than these five men who stayed in there for over an hour. I do not recall any.  
492 During the time that I had this place under observation I don't recall any person who stayed longer than an hour. I do not recall any others besides these defendants, yet some of them may have stayed an hour or more, these unidentified people. I made a mental note of those people. I do not recall any of them now.

*Walter F. Martin—For Government—Cross.*

*Cross-examination by Mr. Cahill:*

493

I testified that Exhibits 62, 63 and 64 were found beside the chair; they were found on the floor beside Mr. LeVeque's chair on which he had been sitting.

*Cross-examination by Mr. Climenko:*

I wouldn't be sure if I saw Mr. Hoffman enter the restaurant on February 28, 1936. I saw him there on several occasions. I said I thought it was the 28th; I didn't say positively. That is the date I am referring to, whatever date it was I first seen the five men together. As a matter of fact, I am not even sure it was the 28th, I might be wrong as to that date maybe by one or two days one way or the other—not more than that. On that day, whatever day it might have been, I saw Mr. Hoffman enter the restaurant around noontime. I, as well as I recall, spent most of the forenoon on the south side of the street sitting in my car. The restaurant is on the south side of the street. I was on the same side as the restaurant at the time Mr. Hoffman entered the restaurant. I was about four small or five car lengths from the restaurant, probably the length of this court room, about 75 or 100 feet or 150 feet, whatever it is. I don't know what the length of this courtroom is, I never measured it—between 75 and 100 feet. That is the best I can do with that problem.

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I was about that distance from the entrance to the restaurant on that day. Mr. Hoffman was walking on the south side of 46th Street in an easterly direction from Eighth Avenue when he was walking toward me when I was facing him. The mathematics would make it probably 200 feet from me when I first seen him. I did not recognize Mr. Hoffman when he was 200 feet from me. I

*Walter F. Martin—For Government—Cross.*

496 don't know that I recognized him as Mr. Hoffman until he was probably five or six feet from the entrance to the restaurant. I saw him enter. At the time that I saw him leave the restaurant I was near this little coffeeshop on the corner of Eighth Avenue and 46th Street. The coffee shop is at the corner. The restaurant, technically I would say, about 150 feet from where I was standing.

I saw Hoffman as soon as he came out of the door. These gentlemen came out together. I wouldn't say abreast—in a group, probably two abreast. Well, five men came out in a little group, probably a foot apart. They came out in a group, they didn't walk out abreast. They just  
497 walked out like any five men would walk out. Some were adjusting their overcoats and scarfs as they walked out. They were all in the same group. That is the best answer I can give. I don't recall who came out first. I never heard any conversation between Mr. Hoffman and any other person. I mean before today. The last time I saw Mr. Hoffman was either on the date that I referred to or March 2nd of that year. That is the last of February, February 26, 27, 28.

Mr. Climenko asked me whether on the occasion I described when I saw five men coming out of that restaurant as I explained to Mr. Dunigan, and I said February 28th, and I now say it might be February 28th and might be  
498 March 2nd. At this point, so far as my present recollection is concerned, the date I have in mind when I saw these five men might have been February 26th or February 28th or March 2nd.

*Cross-examination by Mr. Nolan:*

I never saw Mr. Callahan, Mr. Nolan's client, or Captain Brown, who is his own attorney, in the restaurant at any time of day with these people. In answer to a question by Mr. Dunigan, I said I know Callahan and Brown. I didn't

*Walter F. Martin—For Government—Cross.*

intend to convey to this jury that I knew Callahan and Brown prior to the 26th day of March, 1936. Mr. Dunigan asked me if I knew them; I do know them. But I didn't know them prior to March 26th. I did not mean to convey to this jury, prior to that, in connection with the men I called conspirators. The first time I saw Callahan was the night at our office in the Sub-Treasury Building about March 22nd or 23rd, 1936. He was president of the steamship company called the Alco Steamship Company. I don't know that he was president of a company with a steamship formed from his name Austin L. Callahan, Austin L. C. Callahan. There was an inquiry, and I participated in the inquiry. I didn't go down to Broad Street, New York, and suggest to Mr. Callahan it might be a nice thing if he went to the Sub-Treasury Building. I know that Mr. Callahan went around voluntarily to the Department and that I was present when he arrived there and made the handwriting which is one of the exhibits in this case. He had not been arrested when he came there. I showed him one of the business cards of the Alco Steamship Company or some of the agents showed them to him in my presence which was marked for identification and which had certain handwriting on it. He was asked would he write the words that were on that card, and he wrote them. I don't recall that he at the same time said to the other agents and me that that was a common business card of the Alco Steamship Company and he had given at least 100 of those to people with whom he was endeavoring to negotiate contracts, nor do I recall that he mentioned the Cargill Grain Company, Cargill Coal Company, Cooper Gas & Oil Company, the Mystic Steamship Company, and a dozen other companies to whom he had delivered his card, giving on that card also his house telephone number in case they could not get him in his office. I don't recall that I was present when he wrote it, nor that he said he had given cards to persons negotiating business with the

Walter F. Martin—For Government—Cross.

02 Alco Steamship Company and also to captains and mates who were looking for jobs and telling them when he had a job on his ship they could find him at his office or his house. He didn't refuse to write when I asked him to.

*By Mr. Halle;*

03 I said I made a memorandum of having observed or seen Gottfried going in and out of the restaurant that day. I have that memorandum with me. I will read it. "Five men came out of the restaurant at 3:50 P. M." That was on February 28th. "Five men came out of the restaurant and walked east on 46th Street towards Broadway"; they were Frank, LeVeque, Geiger, Gottfried and Hoffman. I made that memorandum at the time. On that day I did not put down the name Gottfried. Mr. Halle asked me when I made that memorandum and I said, "At the time"; that means the day I observed it, but I didn't put down the name Hoffman. What I just read I put down in my memorandum book on the day I observed these five men go out. What I just read does not consist or contain the name Gottfried. I didn't read off the name Gottfried just now. Mr. Halle asked me who they were. I didn't read the name Gottfried. You can see this book.

04 I have here one, Frank; two, LeVeque; three, Longnose; four, Shortfellow, and I have some hieroglyphics; that means light hat. And right after that Shortfellow, dark hat. The short fellow that I have marked "new" is the one I identify as Gottfried. That is not the first time I saw Hoffman; I had seen Hoffman before. I knew Hoffman's name at that time, I knew his name. There is no reason why I didn't put Hoffman's name in there instead of the term "short fellow" when I did put in the names of two of the other men that I knew, except that when I first started observing the place I didn't know any of these men. But that day



*Walter F. Martin—For Government—Cross.*

I knew Hoffman by name. I put him down "short fellow" with dark hat on, the same as I referred to Geiger as "long nose." 505

No, 5, short fellow, dark hat; that refers to Hoffman. Long nose refers to Geiger. I had seen Geiger before and I knew him by name. The main reason I didn't put his name down was I had first identified Geiger as the man with the long nose and all through my notes I identify him as the man with the long nose. And I identify Hoffman as the man with the dark hat. That stuck that way. I was told the names of several of the defendants before I started to observe the place. I don't recall that I had Gottfried's name at that time. I don't think anybody pointed Gottfried out to me. It is a fact that when I went over there I was given instructions to look for certain men of a certain type, and I was given descriptions of their clothes, not so much their clothes as a personal description, because they changed their clothes very often. 506

I don't think I was given a description of Gottfried. I was given a description of Hoffman and LeVeque and Frank, so I had no trouble picking them out, and Big Red and Kleb and Erickson. Of all the men that I was given descriptions of I don't recall getting any description of Gottfried. I was given the name Robbie. I knew he was supposed to be somebody connected with these defendants, but just who he was I didn't know. I don't recall that I knew his last name at that time. 507

I was examined by Mr. Halle about 10 or 15 minutes ago. I was asked what attracted my attention to Robert Gottfried, a defendant in this case, and I said because he was one of the men that I saw go in there who stayed an hour or so, and that was the only reason I gave for remembering. I want the Court and jury to understand that when a man went into the restaurant and didn't come out immediately I remembered that he was still in there, and when this man came out of the restaurant in company with four other men whom I had previously seen together going in

*Walter F. Martin—For Government—Cross.*

508 and out of the restaurant, I immediately put him into association with the other men. That was the main reason I wanted the Court and jury to understand. I have not testified I was given Robbie's description, I was told of a man named Robbie associated with them. They did not tell me how tall Robbie was. They gave me descriptions of how tall they were, but I don't know that I had a description of Robbie. In other words, I did not have a description of everyone but Robbie; I did have a description of Kleb. The thing which impressed me most about Gottfried having been there that particular day and recalling that some three weeks later we arrested some persons in the restaurant and Robbie walked in and it was then I recalled very definitely 509 that he was the same fellow I had seen walk out on the 28th. I don't think I spoke to him at all. The day of the arrest I called him Bobbie. He was not arrested on that day. He was let go. He afterwards voluntarily appeared upon request. He was made a defendant when the Grand Jury returned the indictment. I mean there was a case against these men even before the Grand Jury indicted, there were some of them under arrest in the case, and it was not yet before the Grand Jury. During all that period of time while there was a case pending before the Grand Jury returned the indictment Robbie Gottfried was not arrested nor made a defendant in that case. He was not made a defendant until some time after March 20th. I don't just recall definitely. I don't call that a defendant, when a man is caught and put under bail and released. He is a prospective defendant. 510

*By Mr. Nolan:*

It isn't a fact that on the 20th of March when I went to the restaurant a man named Fred Velez was in the restaurant with certain other people and Velez was arrested at that time or went down with certain agents and was not arrested, but he was there when they were arrested.

*Walter F. Martin—For Government—Redirect.*

*Gordon H. Pike—For Government—Direct.*

511

*By Defendant Brown:*

I testified I knew you. I first saw you after your arrest, after the seizure of the Southern Sword. I didn't see you before that.

*By Mr. Dunigan:*

The Southern Sword was owned by the Alco Steamship Company, the company, Mr. Callahan was president of. I didn't see Mr. Callahan, as Mr. Nolan tried to indicate, write on this business card. The writing that I referred to, that is, Government's Exhibit 59 for Identification, I said was the writing on the card he duplicated at the Government office and I did not say Mr. Martin or any Government member saw him write on that card. The writings I referred to are on Government's Exhibits 56 and 67 for Identification. I stopped my regular observations on March 2nd. On several occasions I just passed by and stopped a few minutes, but I didn't make any regular observations after March 2nd. That was the same time that I noticed my license plate on the bar.

512

GORDON H. PIKE, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

513

*Direct examination by Mr. Dunigan:*

I am connected with the Federal Government in the Customs Service. I am Customs Agent and Supervising Agent at this Port of New York. I have been in the Customs Service about 30 years.

*Gordon H. Pike—For Government—Direct.*

I recall on March 20, 1936, going to the Belford Restaurant; it is a short way from the southwest corner of 46th Street and Eighth Avenue. At this time, I don't know the exact street number. It was on 46th Street on the south side. When I went there I was accompanied by other officers, some Alcohol Tax men, a deputy marshal, and there was somebody else in the party. Though I had nothing to do with the investigation or arrest they had in mind I was there merely in case a certain matter transpired due to their investigation—and customs. I had nothing to do with the investigation in this prior to that nor after that.

I wouldn't say I know Frank Nardone but I learned later that one of the men in there was Nardone, I can identify Nardone now as one of the men I saw there. The gentleman sitting by the rail with his hand up to his face, in this row here (indicating), that is the first time I saw the man to my knowledge, as far as I know, yes, the defendant Gottfried was also in the place, the man sitting beside Nardone, to his left, to my right. I don't think I ever saw him before that, though I saw him at that restaurant on that day.

As I say, I had no active part in that. I was having a steak, in fact, I had been there twenty minutes or half an hour, and it was then some arrests had been made or were about to be made. I was sitting towards the back of the restaurant, which was really the basement of an old private house, it appeared to me. There was a bar in the front and a door looking from the front into what appeared to be a back hall; an entrance to the left in which I later found out was a kitchen, and a doorway and entrance to a washroom and a toilet. I saw Nardone, who was sitting to my left over to the other corner, get up and go to the washroom, and in a few minutes he came out. Then Mr. Gottfried came in, I would say in ten or possibly twelve minutes. Nardone went through the washroom and into



*Gordon H. Pike—For Government—Direct.*

the toilet. I went in more out of curiosity than anything 517  
 else to see if anything had been secreted in there. There  
 was no place that you could cover anything, there was  
 nothing but a toilet bowl there and a porcelain flush tank  
 up against the wall so I looked in that. There was no  
 water in it except about an inch I would say which was  
 even with the top of the nipple, the outlet connection and  
 there were two envelopes. I took them out. The envelope  
 was partially stuck and the mucilage was sort of loosening  
 up, and held the envelope together. Yes, a lot of papers  
 and cards were in the envelope. I did not examine the  
 papers at that time.

I communicated with Mr. Martin and later I think Mr. 518  
 Heinz who was in charge, a local tax agent, and we laid  
 them out on one of the tables in the room and looked them  
 over.

Government's Exhibits 58, 59, 60 and 61 for identifi-  
 cation the papers and cards on the white sheet are the at-  
 tached papers that came out of either one or the other  
 of these envelopes, I cannot tell which one. I placed  
 identifying marks on all. They are my initials on them.

Government's Exhibit 65 for identification. This pile I  
 noticed. I don't notice any check on this so far. This  
 went in one of the envelopes and this I don't notice any  
 check of mine on. My initials are on the others. 519

(Government's Exhibits 58, 59, 60, 61 and 65  
 for Identification received in evidence.)

The Court: I will allow you to read that but not  
 to explain it.

(Mr. Dunigan reads Exhibit 58 to the jury.)

Mr. Dunigan: I want to make it clear that I had  
 no intention of explaining, just to read it. I also  
 at this time offer Government's Exhibits 66 and 67  
 for identification in evidence.



*Gordon H. Pike—For Government—Cross.*

(Government's Exhibits 66 and 67 for Identification received in evidence.)

*By the Court:*

They were in two envelopes. I found one yellow sheet that didn't have my initials on. I think it was a garage bill. I had that initialled—every one. That is one I didn't initial.

*Cross-examination by Mr. Halle:*

I was sitting in the rear or south, back of the restaurant, I should say about six or seven feet from the door leading into the back hallway. I would say in the neighborhood of half an hour. I stopped at the bar and conversed a bit with the proprietor, asked if I could get something to eat there. That might have taken five minutes. Then I went back and ordered a steak which took fifteen—about twenty five to forty minutes. I had finished the steak at that time. I observed only two persons I mention going into the washroom while I was there. I did not observe anybody besides Nardone and Gottfried going into the washroom prior to the time they went into the washroom. I had that washroom under observation continuously, but not particularly. I was not paying much attention to it. I don't think someone might have gone into it besides Nardone and Gottfried. No one else might have gone in after Nardone went in and got out and Gottfried went in and the time I went in.

When I went into this washroom and picked up I said two envelopes of papers. I could not define which of those exhibits were in which envelope. I wouldn't say that but they are all mixed up they could be. So far as I know. I don't know which exhibit was in which envelope, those envelopes were business envelopes like that (indicating).

*Gordon H. Pike—For Government—Cross.*

8 by 4 inches or 10 by 5. They were rather bulky. I would say all of the exhibits that are brought here today were in those two envelopes. Some in one and some in the other. I saw Nardone or Gottfried while they were inside this washroom only from the knees down. 523

Now, whatever they did in there with regard to the taking out of those papers I did not see these envelopes on either person, I don't know of my own knowledge where these exhibits came from except that I found them in the washroom. In the flush tank I couldn't say I do, after they were turned over by me to Martin and Martin to some other agent of the Government I had nothing to do with mounting them on paper and I don't know which belongs to which on the mountings. 524

In other words, if there appears to be more than one piece of paper as an exhibit on a white sheet mounted I don't know if those two or more pieces of paper came from the same envelope or from the different envelope. I do not think I could tell except in one case that was brought up here. Where there were two sheets of paper mounted and one was torn off, one part of the exhibit; the bottom was torn off; I would say that was in one envelope. I think the papers demonstrate it. I do not testify of my own knowledge that those two pieces of paper came from the same envelope. I don't pretend to be a paper expert on the weave or texture of paper, so I couldn't say positively where two pieces of paper, which I call exhibits, mounted on one sheet of paper whether they came from the one envelope or from two envelopes. 525

*By Mr. Cahill:*

There were other representatives of the Government present in the vicinity of the lavatory before I found these. There was a marshal standing at the back door or near the back door. In fact he seemed to be stationed there all

*Gordon H. Pike—For Government—Cross.*

the time he was in the restaurant. There was no door except this outside door. There was a doorway, the marshal was standing inside by the door of the restaurant, there was a door frame leading into the lavatory but no door, but there was a hallway in between. He might have stepped into the hallway but I cannot remember seeing him doing it. I don't remember where he was I am telling you he was stationed in the room at all times by the door that led into the hallway or this square foyer that led to the washroom, or the kitchen. He seemed to have been stationed there. My opinion is it was to cover the kitchen and the toilet to see that nobody got out the door that was in the restaurant. He could look into the washroom and above and below the swinging door into the lavatory. I haven't the slightest idea, I don't know, if these men were under arrest at the time. I don't know whether they were under arrest before they went into the lavatory. The officers were there and they were questioning them. I didn't see anyone placed under arrest.

When I went in, which was a couple of minutes after the Alcohol Tax agents, they were questioning a big set-up man at one of the front tables. I saw none of them searched, although they did have a lot of papers on the table when they were questioning this man. If they had been arrested they were near here. I am not in a position to state under oath whether they were arrested or not. I tell you I don't know whether they were arrested or not arrested.

*By Mr. Climenko:*

I might have heard the names of the defendants in this case. I couldn't say yes or no if I ever saw Hoffman before I saw him in court. His face is familiar, but I don't know whether it is from seeing him around at the previous trial or somewhere else. I might have seen him at the previous

*Gordon H. Pike—For Government—Redirect.*

*Fred G. Velez—For Government—Direct.*

529

trial I couldn't say. What I wanted to convey was I might have seen him before—his face was familiar—I don't say at 46th Street. I don't know if at the previous trial, his face looks familiar, but doesn't connect up with this case.

*By Mr. Dunigan:*

I do not know whether he was at the other trial. I do not know where he was.



New York, March 17, 1939.

530

# TRIAL RESUMED.

Mr. Dunigan: At this time the Government offers in evidence Government's Exhibit 3 for identification.

(Government's Exhibit 3 for identification received in evidence.)

FRED G. VELEZ, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

531

*Direct examination by Mr. Dunigan:*

I am a seaman on the Dixie Sword and the Sword Steamship Company. In 1935 I was on the SS. Eastern Glade, owned by the Prudential Steamship Company. In October, 1935, I left the employ of that company. I haven't my discharge papers in my possession, I have a letter from the Port Captain with me now (handing paper to Mr. Dunigan). I am certain it was October, 1935.

*Fred G. Velez—For Government—Direct.*

2 After leaving the Prudential Steamship Company I went to work on the SS. Southern Sword—please, that is a mistake. My next employment was on an oil barge. I was on that barge approximately a month and a half. After leaving the Prudential Steamship Company in October, 1935, I had several meetings with Pierre LeVeque. I have known him for a considerable period of time, for eight or nine years. I saw LeVeque in the latter part of 1935 in the Hotel Astor. I do not recall the approximate date of that visit, but it was around the first part of November, 1935, approximately. I generally met Pierre LeVeque around the offices of Loucheim, Minton & Company, stock brokers, in the lobby  
33 of the Hotel Astor. There were a number of telephone booths around, I should say eight or ten.

Pierre LeVeque was not alone when I met him on this occasion. Most of the time, I knew those who were with him. On this first meeting Bert Erickson was the first one I met with LeVeque in the Hotel Astor, as far as I can remember. I see Bert Erickson in the courtroom. He is the last man sitting to the left with his hand to his ear. On this first meeting our conversation contained nothing of any special interest, nothing but domestic conversation, news of the day, asked me where I was the last couple of years, which I told him. I had not seen him for a couple  
34 of years. LeVeque didn't introduce me to Erickson that time. I went out personally to see LeVeque about a job at that time. He discussed that subject with me. I asked him what he was doing, if he was working, if there was any possible chance of getting a job on one of his boats outside. He said he expected to go to work shortly to do something and he would let me know. It was hardly necessary to tell me what the subject was because I knew what his business was. LeVeque had told me what his business was before this conversation. He had said he was in the liquor business, bringing in liquor to the United States.



*Fred G. Velez—For Government—Direct.*

We had no real special conversation regarding liquor at that time. From the Hotel Astor we went to the Normandie Restaurant on 46th Street to have lunch and I asked LeVeque what chance there was to get a job on one of his boats as navigator outside, not running it inside. He said, "We may have something to give you, but at the present time one of our boats, the Pronto, was towed into New London." He said it had been rammed by a Coast Guard and was towed to New London. When he mentioned the name of the Pronto, Erickson, a man by the name of Nardone, and, I am not positive, but I think a big fellow by the name of Kleb, were present. Erickson and LeVeque and I had gone from the Astor to the Normandie. I first met Nardone at the Normandie—we met Nardone and a fellow named Kleb. I see Nardone in the courtroom. He is the first man on my right, sitting down in the first pew. I don't mean this row (indicating), but this row (indicating). We had lunch at the Normandie Restaurant together. That is, Nardone, Erickson and Kleb and I. There was not much conversation in about an hour or hour and a half. I left the restaurant and went downtown. No more was said about the Pronto than to say she was taken into New London and he couldn't do anything. 535

This conversation took place at the Normandie. I didn't talk much with Nardone, the first time I met him, I didn't know the man. He didn't say as much as LeVeque. LeVeque did most of the talking with me at the same table. I saw LeVeque after this meeting at the Normandie Restaurant, well, a couple of days after. For the first two weeks I would generally get there every other day and meet LeVeque at the Hotel Astor, to go to the Normandie. I don't remember any special conversations between LeVeque and Kleb on the first day. I recall them mentioning the Pronto. The Pronto was mentioned between all of them. I did not hear any conversation at that time with respect to the ownership of the Pronto. I did not know then who was the owner of the Pronto. 536 537

*Fred G. Velez—For Government—Direct.*

538 I stated that I saw LeVeque again a couple of days later at the Hotel Astor. Erickson and Nardone were also present. There was nothing special that happened. I stood up and waited and LeVeque and Nardone and Erickson were talking. They said, "Let's go out and have lunch," and we went back to the Normandie and had lunch.

There was no conversation between LeVeque and Erickson in my presence. We went to the Normandie. We sat down at a table, ordered dinner, ate, and had general conversation of the news of the day. It was not all of boats. There was conversation at the Normandie on this occasion concerning boats, every meeting there was some conversation regarding boats between them. This time LeVeque also mentioned the Isabel H.

539 LeVeque told me that Ducose, a captain by the name of Ducose, was on the Isabel H, and if Ducose would get back with the Isabel H. and go on the Pronto he would put me on the Isabel H. He said he would see what could be done. He didn't have everything to do with it. He said he would speak to Nardone and Erickson to see what could be worked out. I don't remember whether Kleb was present or not. Kleb was present very seldom. He didn't meet there often when I was there. When I was there about twice a week Kleb was not there every time. I did not have any conversation with LeVeque concerning Kleb. He didn't tell me what his business was. After these first two meetings I did not visit the Hotel Astor more than twice a week, sometimes once a week, sometimes twice a week, every other day or so. That continued for about a month and a while. My last visit at the Astor was around the first part of the holiday of 1935, around Christmas. I don't remember the exact date. I couldn't say. I didn't keep a record of it.

540 At these meetings at the Hotel Astor most of the time Erickson, Nardone and occasionally a man by the name of Hoffman, and Bill Kleb, a big, fat fellow, were present. I do not know Hoffman's first name. I would recognize him

*Fred G. Velez—For Government—Direct.*

if I saw him now. He is the middle man in the front row of the seat, the third man from the left. Nardone and Erickson and Kleb never introduced me to either of them. I don't think they used any method of introduction. I have never been introduced to any of them. I don't remember if LeVeque said anything to Nardone and Erickson and Kleb to the effect that he knew me in the past or that I used to work for him or something like that. If he did I didn't hear him. In the Hotel Astor there was never any conversation between me and LeVeque or any of the other men. In the Hotel Astor they were always talking to themselves and I was standing at one side waiting until they would go to lunch. I had no conversation with anyone directly with them at the Hotel Astor. They were talking around the telephone booths and a corridor in the hotel. 54

I saw these persons, LeVeque, Nardone and Erickson, make telephone calls at the different stations. I don't know whether they received incoming calls there. They had been in the telephone booths. There was a woman operator near these pay stations. I did not get her name. LeVeque or Erickson and Nardone addressed her by her first name, but I don't remember the name. I couldn't tell you what the name was, but they did call her by her first name. It is three or four years ago. That's right, they called her Stevie. I can recognize the girl if I see her. At these meetings there were always conversations on the Isabel H and the Pronto all of the meetings. I cannot state who was present at each of those meetings. Generally Nardone, Erickson and LeVeque were always present. Kleb was not there very often, in fact very seldom. He was not there so much as the others. He was there on occasions when there were conversations concerning the Pronto and the Isabel H. 54

I know a man by the name of Geiger. I have also met Saunders. His first name was Big Red. Kleb was Big Bill, he was big enough. That is a photograph of Kleb (indicat-

*Fred G. Velez—For Government—Direct.*

44 ing). This photograph, Government's Exhibit 57 in evidence, is Geiger. And Government's Exhibit 2 in evidence is the one I know as Big Red. At these meetings I would always ask him what the possibilities of a job were, I was looking for work, I was looking for a job, but I never seemed to make headway, I couldn't get on the boat. He didn't say he could not remove Ducose, he said he would try and see what changes he could make. Kleb was not present as often as the others. I did not have conversation with LeVeque or Nardone or Erickson concerning his absence. There were no conversations between myself and LeVeque or myself and Erickson concerning Halifax, Nova Scotia. That city was  
 45 mentioned at these meetings by LeVeque. I don't remember any others. LeVeque said that the Isabel II was in Halifax, that the boat was lying in Halifax waiting to go to sea. That is all that I can recall he said about Halifax. He didn't tell me anything that Big Bill was in Halifax. I overheard conversations between them that Kleb was in Halifax. And in these conversations that I overheard the nature of his trip was revealed. He went up there to buy the cargo, pay the bills and straighten out the account of the boat. I heard that in conversations at these meetings.

I know the defendant Austin L. Callahan. I see him in the courtroom, the second man to the left—on my right, the  
 46 second man, between Erickson and Hoffman. I knew of Callahan for a couple of years, three or four years. I knew of him, I heard of him, I didn't meet him, but I had heard of him. I first met him around the middle of November, 1935, approximately. I met him at that time at his office at 50 Broad Street. That was the office of the Alco Steamship Company.

The Court: When was this?

The Witness: This was approximately the middle of November, your Honor.

*Fred G. Velez—For Government—Direct.*

When I saw Callahan at his office I went there alone. I 547  
 had not met him before. I went directly to his office, introduced myself, told him who I was, and told him I understood he has a boat running, that he owned the Southern Sword, that I had a party who could probably buy her or use her. I didn't tell him the name of the party then. Well, during our conversation at the restaurant, before going to Callahan's, LeVeque asked me if I knew where I could get a boat cheap to take some alcohol in. Nardone and Erickson were also present when this conversation took place. I told them I would try. I went around to find a boat. I went to the Alco, Mr. Callahan, to see if he wanted to sell his boat or use it as a charter to bring in some alcohol. I 548  
 told this to Callahan. He said, "How much is there in it?" I told him, "It is hard to say, you could probably get three or four dollars or five dollars a case for bringing it in, and there is a possible chance of selling the boat providing you sell the boat cheap." He said he would like to meet the party. I went back and told LeVeque and I got Callahan and introduced him to LeVeque and Erickson. Nobody else was present when I brought Callahan there. I introduced him to Erickson as Erickson, but LeVeque told me to introduce him as Comte. I don't think it is the French word for Count, but it may be. They had a conversation. I went away from the table and left them. They said I need not go away, I could stay there. After I introduced Callahan to Erickson and LeVeque I went away from the table. They 549  
 said, "You don't need to go away from the table." They said, "Captain, you can stay here, and I went back." First Erickson asked him what kind of boat he had and where she was running. Callahan told him what kind of boat he had and what he would bring in the alcohol for. No more was said in reference to that question.

I remember that. They didn't come to any decision to use the boat then because LeVeque did not have enough liquor outside to pay for the boat. LeVeque said Callahan



*Fred G. Velez—For Government—Direct.*

550 wanted so much, and he couldn't pay so much because he didn't have enough liquor to warrant that price. He wanted a lump sum. At that time LeVeque didn't know how much he had outside.

I saw Callahan once or twice after this meeting at the Astor. It was a couple of weeks later, might be eight or ten days on this second visit I went to his office alone. I told Callahan first I was trying to get LeVeque to use the boat to bring a cargo in but LeVeque did not want to use the boat because he said he was scared and that he didn't like the proposition, and at that time LeVeque did not have any alcohol on the boat.

551 LeVeque had said, "Who owns the Southern Sword?" I said, "The man who owns the Southern Sword is the man I introduced you to, Lee Callahan." He said, "He owns it himself?" I said, "Yes, he is a company". He said, "That's funny, that he is willing to use the ship to bring in alcohol." He said, "I think he is a Federal man." I said, no, he was not. He said, "Why does he want to risk his boat bringing in alcohol?" He said, "All the alcohol I have is 1600 cases to 2000", you couldn't pay the money for bringing it in. It was not to exceed 3000, that is the cans he could handle.

552 I told Callahan that the boat was not ready, that the boat was still in Halifax, and the name of the foreign ship was on the ocean. The ship on the ocean was the Rydoon. I asked LeVeque if he had 3000 cases whether Callahan would bring it in. He said he didn't know if he had enough money to buy 3000 cases, that he had to get money from Montreal and didn't know whether he could get it. I knew the agents he dealt with in Montreal, Bernstein—it was a "stein" anyway, Goldstein or Bernstein.

When I came from Callahan's office on this second visit and spoke to LeVeque I don't remember if it was in the Astor or a restaurant when LeVeque said he thought he might

*Fred G. Velez—For Government—Direct.*

be a Federal man. It could be either one. I couldn't remember who was present because sometimes I met LeVeque alone, before they came, and talked with him, before the others would meet us. I don't remember the exact date when I saw Callahan again but I went up to his office again to see him about the same matter. I cannot see why I should say the date this was when I don't remember that. I would be telling a lie then. Yes, easily within a week, less than a week before Christmas and in his office, that is the only place I met Callahan.

553

Well, the conversation was regarding how quick LeVeque could get the cargo off the boat. Callahan said that he would sell his boat I think the price was \$30,000. He said he didn't want to buy another boat, it was too much money, didn't have that much money. I did not tell it to Callahan.

554

The conversation I had with Callahan each time, or the third time was he wanted to find out how quick LeVeque would be ready to bring the cargo in, that he had his boat and was ready to bring it in any time LeVeque would be ready. Callahan told me that. I couldn't fix any price, to be paid but Callahan said what do you want out of it. I said, "nothing not even a suit of clothes, not from you."

I had conversations personally with Callahan concerning Eastport. He told me that the boat was in Eastport, Maine—I won't say Eastport, I don't remember the exact port, but a port in Maine, and it would be a good place to meet the boat outside with the alcohol and bring it in.

555

The Witness: I just will have to approximate the time, the same as the others; I didn't keep no track of it.

I cannot give the date and I don't know whether it was in Eastport, Maine, definitely.

*Fred G. Velez—For Government—Direct.*56 *By the Court:*

Your Honor, what's the use, I could say anything, it wouldn't mean any more. I could say the 15th of November and it would not be any good any more than if I said the 15th of December, I don't remember. It was before the holiday, and after the third conversation with Callahan. I told LeVeque that he should see up in Maine. LeVeque said he didn't want to use the boat because he was cleaned, he was scared he would lose the cargo. I saw Callahan again at his office, that would be the fourth time it was the latter part, I am sure, of February or the first part of March. I had not seen him during January. I spoke to him on this fourth visit in the latter part of February or first part of March.

57 While I was dealing with Callahan I asked him if there was any chance of getting an officer's job on his boat, I would like to have it, even a third mate's, and he said, all right, and while I was on the oil barge I got a telephone call from William H. Swan & Son that Callahan had called and tried to find out where Velez was, and when I got the telephone message, it was the following day, I went up and saw Callahan and Callahan told me he had already got a second mate but when the boat got back he would soon have a vacancy and would have something for me in two or three days. I quit the job on the oil barge and went to Bridgeport and joined the ship Southern Sword, as third mate, in the latter part of February, 1936.

58 Going back to these meetings at the Astor and the Normandie I had conversations with LeVeque and Erickson concerning distances, nautical questions, and so on, at numerous times LeVeque would ask me the distance between places, certain ships and certain ports, lighthouses, and distances from certain places with latitude and longitude at sea, most of the time at the conversation Erickson and Nardone were present.

*Fred G. Velez—For Government—Direct.*

I went up to Bridgeport on the Southern Sword, I went to Callahan, he told me I could go to Bridgeport as third mate on the Southern Sword, and when I got out there I found Mr. Pendleton, the captain, was not going, and Mr. Brown indicating the chief officer, was acting master. Mr. Hugh Brown the defendant here.

Prior to my signing on the Southern Sword I was not around the Belford Restaurant on 46th Street I hadn't seen LeVeque from that time, from the time I got the job on the oil barge I didn't see LeVeque. I didn't even see him when I went on the Southern Sword.

I was not at the Belford Restaurant on 46th Street prior to March 20th, not in 1936.

From Bridgeport we went to Newport News. No, I don't remember to within 48 hours when we arrived at Newport News. I do not recall the date. At Newport News, we loaded a cargo of coal and sailed to Boston. From Boston we went to Newport News again. We arrived this time I think on a Monday, I don't remember the date, I didn't check up on the date, it was in March, between those two trips that I have spoken of I saw Callahan in Boston. I was up in Boston when the ship was discharging, and when we went down to Newport News on the second trip I saw him in Newport News. On this second trip when I saw Callahan in Newport News I did not talk to him. I know he was in Newport News two days before—the day before St. Patrick's—I don't remember the date. St. Patrick's day is always the 17th. So the day before would be the 16th, twelve to one o'clock in the morning of the 16th. I didn't talk to him but saw him aboard, he was talking to the captain. Ralph Pendleton. Pendleton joined the ship as master in Boston again. Captain Brown went back to chief mate and I was first mate. We went to Norfolk. When we got to Norfolk Captain Pendleton, Mr. Brown and Mr. Callahan went ashore in a boat together and the

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*Fred G. Velez—For Government—Direct.*

562 ship was anchored in the stream. Around four o'clock in the morning a tow boat came and tugged the ship and loaded coal. About daylight in morning Mr. Brown came down on the tug and we were then loading. After we got loaded, it was around breakfast time, eight o'clock, I went around to see Captain Pendleton. He was aboard then. I asked him for some money to send home. He said, "All right, can I mail it in New York to you?" I said, "It won't do much good to mail it in New York, if we go to New York, I want to mail it." He said, "I will get there before you." I said, "Aren't you going back to New York?" He said, "No, I was going up by rail." I didn't question  
 563 what his business was. I gave him some money, ten dollars, and he mailed it for me ashore at Newport News.

We left Newport News around eight or nine o'clock in the morning of the 16th and started for sea.

After we left the dock Brown, the captain, told me, "We are going to stop and take some liquor in, some stuff in." I asked him where and he said six or seven miles from Winter Harbor Lightship. That is approximately 90 to 100 miles from Newport News. I said to him, "There is not much money in that business, how much are you taking?" He said, "I don't know." I said, "Captain, we had better not stop for it, there isn't much money in it." He said, "If  
 564 the boat is there we will take it, if not, we will continue." He didn't know the name of the boat or didn't tell me if he knew it. I said, "Captain Brown, if I knew they were going to stop for the stuff", because there was no money to pay me, I said, "I wouldn't take the cargo in", because I couldn't get enough money from Callahan and there was not enough to warrant me to take the risk.

I asked him who the cargo was for and he gave me the name of some—he gave me a paper with the names Edmond and Gottfried, some names similar to that, I don't remember the exact spelling. I said, "You cannot get by on



*Fred G. Velez—For Government—Direct.*

that, the chances are that isn't their names, they wouldn't give you their right names." He didn't say. I said, "Where did you get the names from?" He said someone he didn't say who gave it to him in Newport News. We didn't have very much conversation about it any more than he told me to "Clean the shelter deck up, and we will put it in the shelter deck."

Q. Did you know a seaman on that boat by the name of Bahe? A. There was a Philippino by the name Bahe on the boat, a bosun. I know a fellow by the name of Sabina. Yes, those two men were on the ship at that time.

Q. When? A. It was about 11 o'clock on the night of the 16th when we got to the vicinity of Winter Harbor. My watch below was from 8 to 12, and I was called out and it was said the boat was there.

One of the sailors called me out. I came out on deck and heard the motor of the boat. We slowed down. I told the captain, "There is the boat". All the sailors got out and when the boat came alongside I saw it was the Isabel H. I saw the name and saw Ducose and Bellman. I knew the boat was the LeVeque boat. I said to Captain Brown, "That is the same boat I thought we were trying to take in a few months ago." I didn't talk with Ducose as much as I did with Bellman. I asked Bellman what kind of trip they were having. He said, "A hell of a trip," they were attacked everywhere they would go, they were followed by the Coast Guard. They went into Bermuda and the Coast Guard laid in Bermuda with them, and they had a hard time getting rid of the cargo, he also told me he had 1600 cases of alcohol these 1600 cases were subsequently loaded on to the Southern Sword.

This photograph, Exhibit 52 in evidence, looks very much like the Isabel H. And this one, Government's Exhibit 51 in evidence is the boat.

*Fred G. Velez—For Government—Direct.*

568 The transfer of this cargo took approximately three hours, the weather was not clear, it was breezing up from the south. The Isabel H was not in distress that I know of, it didn't say so. It moved away under its own power.

I saw the cases that were being unloaded, they look like Government's Exhibit 32 in evidence the same size cases. I smelt an odor of alcohol. There was quite a few broken and leaking cases. I smelt a lot of alcohol that night.

From Winter Quarters Lightship we came to New York arriving off the Statue of Liberty around the neighborhood of nine or ten o'clock. On the following day, March 17. We went to Pier 72 or Pier 74, I think Pier 74, Hudson

569 River. From six o'clock March 17th until eight o'clock p. m., I was on the bridge, on the lookout. I was called out about eight o'clock, about nine o'clock, and stood by the anchor winding. We were off the Statue of Liberty.

It was raining heavily, strong easterly wind. A tow boat came alongside, eased alongside, and afterwards went away. I saw the tow boat, I saw the smokestack, the tow boat and the smokestack. The smokestack had the letter "M" on it. I did not specially recognize anyone on that tow boat whom I had seen before that tow boat was alongside the Southern Sword. I would say not over three or four minutes. When I was forward and the boat, too, was alongside, I heard talking from the tow boat to the ship.

570 I did not recognize voices, I was too far away. I do not know whether any person boarded the Southern Sword from the tow boat. I didn't see anyone come on board the ship. The tow boat left and went ahead of the ship and she went by the Battery and to Pier 72 and stopped. I don't think it first stopped at the Battery, I don't remember whether she stopped at the Battery or not. In any event it went on up in the vicinity of Pier 72 and we went up to the same pier where the tow boat was. The tow Boat was around when we were trying to get into the dock. We were

*Fred G. Velez—For Government—Direct.*

about an hour trying to get into the dock, and the tow boat was around. We got into the dock. Some men opened the pier. We had some men on the pier, and then took the 1600 cases ashore. I saw three trucks on the dock with quite a few men loading. I had never seen any of them before. The unloading took a couple of hours, two hours and a half, I saw the cases being loaded on to the truck. I did not see Callahan at the pier that night. I didn't pay no special attention to Captain Brown. I went there and told him, he was in his room when the cargo was finished, I said, "We finished discharging the cargo, I am going to leave immediately". I left around two o'clock in the morning of the 18th and went to Bridgeport immediately. Captain Brown was still in command. As I remember, the ship was there three days. When we first got to Bridgeport, Captain came to New York. 571 572

Captain Pendleton came again. I didn't go out on the Southern Sword again. Apparently when I was there Pendleton was in the master's room, so he must have taken command again. I left the boat, the captain told me that, he was to give me some money and to come to New York, when I got back to New York I went to Callahan's office. There was someone in the office, there was a girl and the clerk. I went in to see Callahan, went into his private room. He sat down and he said, "I have never seen one of those fellows, not one of them has come around and I don't know where to look for them". He said, "The Captain has been here and I don't know where to find the men to pay for the alcohol". He asked me if I knew the party. I said, I told him, "I think I do," because it was the same boat I had reference to three or four months ago when we were trying to make a deal. I told him it was the same boat we had had there. Callahan said it was not LeVeque, that it was another party who made a deal with him from New Jersey, he thought it was a Jersey 573

*Fred G. Velez—For Government—Direct.*

574 mob. That is what he said, it was not by LeVeque. This was in his office right, he didn't tell me the name of the person he had dealt with but it was not LeVeque or Erickson and those were the only two I had introduced to Callahan.

He asked me to see if I can find out who had the cargo. I said, "I will try and find out who has the cargo, because I think I know who has it." I said, "What do I get out of this?" When we started, on the date, there was no promise that I would get anything, so I said to Callahan, "What do I get out of this if I find the party who has the cargo," so I went up to LeVeque's house, 65 Central Park West. I got there about ten o'clock in the morning and I rang the bell, and the doorman rang up LeVeque, and he said, who was it. I told him, "Captain Velez". He said, "Come up." He said, "Where do you come from?" I said, "I come from Bridgeport," and Big Red Saunders was there in LeVeque's apartment. I told him, "You got 1600 cases of alcohol three nights ago, didn't you?" LeVeque put his hand to his jaw like that and said, "What?" I said, "I gave you 1600 cases of alcohol the other night." He said, "What are you talking about?" I said I was the mate on the Southern Sword. I said, "Captain Ducose gave me a message to give to LeVeque. I gave it to a man who was on the Southern Sword." He said, "I thought you went with Erickson." I said, "No, I got a job on an oil barge, and after that I got a job as third mate on the Southern Sword."

I said, "We brought the liquor in three nights ago. Callahan wants his money. You have to do something about it." LeVeque said, "I sold that cargo." I said, "Who did you sell it to, somebody has got to pay for the freight, you got to keep it quiet." He said, "We will go down to the Belfort and meet this party."



*Fred G. Velez—For Government—Direct.*

At this time I didn't believe LeVeque, that he had sold the alcohol, and we were to meet this party, and he said, "Listen, Captain, we got the cargo, but haven't sold anything yet." He said, "Suppose we give you a thousand dollars and you tell Callahan you don't know who got it." I said, "You get the thousand and I won't tell anybody." I told Callahan about that.

This time I went back up to the restaurant to get the thousand, and before I got the thousand the Federal men walked in and arrested the whole bunch of us.

When we went to Central Park West he did not say anything about Nardone, but we went in a taxi from LeVeque's house to the Belfort Restaurant. He was worried. He said, "I expect to be arrested any minute, or any time." When we got down to the restaurant we stayed there a little while and Nardone came in, and then LeVeque told Nardone, he said, "Velez was on the Southern Sword".

I don't remember what Nardone said. Nothing was said then about the arrangements that had been made for Callahan to bring the cargo in they didn't tell me what price they were paying or what arrangements they had.

I have told you that LeVeque and Erickson were the only ones I introduced to Callahan, and so far as I knew no definite understanding was had between either LeVeque and Erickson with Callahan with respect to the cargo. It was all lopsided, and they didn't want to use the boat.

At 65 Central Park West LeVeque told me Nardone went to Callahan. I don't remember that he said he went alone, but he said Nardone went to Callahan alone, and that is why LeVeque figured to give me the thousand dollars and not say anything about it, that Callahan would not know who had it. LeVeque told me this.

LeVeque said, "If I give you a thousand dollars Callahan won't know who had the cargo." At that time Callahan did not know that LeVeque had the cargo. Captain



*Fred G. Velez—For Government—Cross.*

580 Brown, after sailing from Newport, showed me a card with Edmond and Gottfried on it. After the cargo had been brought in concerning those two names, I told LeVeque the card the captain showed me was Edmond and Gottfried. I don't remember positively now what he said. I don't want to say positively, but he did say whoever it was, and went to Callahan, used the name of Edmond. LeVeque told me that is the name that Nardone used for Callahan, Edmund or Edmond, I don't know how it is spelled. I don't know whether he was lying or not, but that is what he told me. He didn't mention the other name, he didn't seem to worry about the other name, but he said that was the name Nardone used for Callahan.

581 I had asked Callahan, I said, "What do I get out of this?" I said, "Callahan, whatever you get you can put on the table yourself." He said, "I don't want to do that." He said, "You go and do what you can. If you get some money, I will make it right." That was at the meeting in Callahan's office after I came back from Bridgeport. No one else was present besides me and Callahan.

The last time I saw Captain Brown was this spring—not this spring, 1939—it was 1938, on Beaver Street. I was cleaning my shoes. I saw Captain Brown coming along.

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AFTERNOON SESSION.

FRED G. VELEZ, resumed the stand.

*Cross-examination by Mr. Cahill:*

Q. Where are you working now? A. On the Sword Steamship Company, SS. Dixie Sword.

Q. You mean you are now connected with that ship? A. Yes, sir.

*Fred G. Velez—For Government—Cross.*

Q. When are you leaving? A. As soon as I get through with this court. 583

Q. When is the ship scheduled to leave? A. Tomorrow morning, not later than tomorrow afternoon from Alexandria.

Q. Alexandria, Virginia? A. Yes, sir.

Q. Where is it going? A. Going to Norfolk, Virginia. I will be there 12 to 16 hours. I don't know when she will go from there.

Q. In what capacity are you working on that ship? A. As an officer.

Q. Have you any orders directing you to be on that ship at a particular time? A. Not until they are finished with me. 584

Q. Will the ship sail without you? A. The ship will sail whether I am there or not.

Q. You will be employed with the company just the same? A. No, not if the ship sails without me.

Q. You are first officer? A. Yes, sir.

Q. Isn't it customary when a first officer is delayed for any business that a substitute is made and he goes on a ship on the same line? A. (No response.)

Q. Who communicated for you to be in Alexandria at a particular time? A. No special one. I went up to the Sword Steamship Company yesterday and let them know I was here in court. 585

Q. What did you say to them? A. I told them I hoped to get through this evening. That was yesterday. If not, I will get through as soon as I can.

Q. Then you are not obliged to get back there tomorrow morning? A. No, I am not obliged, but if I don't get back tomorrow I will lose my ship.

Q. Did he say that to you? A. No, but suppose I don't get back under four or five or six days?

Q. Did he say that to you, "Get back as soon as you can"? A. No, he said, "Get back as soon as you can."

Q. Then you can get back there tomorrow morning?

*Fred G. Velez—For Government—Cross.*

586 Mr. Dunigan: I don't contend this man has to be back. I could hold him.

Q. Have you a master's license? A. Yes, sir.

Q. When did you get it? A. I have a sailing ship license—in 1918.

Q. Is it what is called a "limited license"? A. No, my sailing ship license, all oceans; all tonnage.

Q. How about steamers? A. Steamers I have a license for freight and tonnage, all oceans.

Q. Have you got it with you? A. Yes, sir.

Q. Got it in your pocket? A. Yes, sir.

587 Q. When did you first unbosom yourself to the Government and tell them all of the facts, to any representative of the Government?

Mr. Dunigan: I object to the characterization "unbosom."

Q. When did you tell all the facts to any representative of the Government? A. I think two years ago in the court here we had a hearing in the same case.

Q. Was that at the time you were arrested? A. No, not at the time I was arrested, when we had a hearing in this same case approximately two years ago, I think.

588 Q. When were you first arrested? A. I was arrested the same day with—I don't know whether I was arrested or not—I was taken from the restaurant down to the Federal Bureau of Investigation.

Q. Some officer told you to come along? A. Yes.

Q. With the rest of them? A. Not with the rest of them. I went with myself, with Mr. Hines and another gentleman.

Q. With the defendant Gottfried? A. Yes.

Q. Two officers of the Government took you? A. Yes.

Q. To what place? A. To Pine Street, Mr. William Dunigan.

*Fred G. Velez—For Government—Cross.*

Q. Mr. William or Mr. Lester Dunigan? A. Mr. William Dunigan. 589

Q. And they questioned you regarding this case? A. No, the first day they took me down there they questioned me regarding what I was doing in company with LeVeque.

Q. Did you tell them your whole story of your acquaintance with LeVeque? A. Yes, practically. I didn't tell them the whole story, because they didn't ask me. I told them the truth, all that they asked me.

Q. Did they ask you how, and under what circumstances, you became acquainted with LeVeque? A. Yes.

Q. What did you tell them then about your acquaintance with LeVeque? A. I told them I knew LeVeque for about 590 eight or nine years and that I worked for LeVeque.

Q. In what business? A. On a rum boat, running liquor from Nova Scotia, from St. Pierre, Miquelon.

Q. Into where? A. The Atlantic Ocean.

Q. What ports? A. No ports.

Q. Your part was to take it from Nova Scotia, take it lying off the coast? A. Not Nova Scotia.

Q. Was it from some other point in Canada? A. No, not Canada.

Q. Where was it? A. St. Pierre, Miquelon, French land.

Q. You are not French, are you? A. No.

Q. You are a Porto Rican? A. No, Columbian, South 591 America.

Q. Did you live in Porto Rico for a time? A. No, I traded out of there for a time.

Q. How long were you engaged in operations with LeVeque, rum-running operations with LeVeque, prior to 1935? A. Since 1927.

Q. Up to 1935? A. No, 1931 or 1932.

Q. Were you a partner with LeVeque? A. Never was a partner, no.

Q. How long have you known him? A. Since 1927.



*Fred G. Velez—For Government—Cross.*

592 Q. How did you become acquainted with LeVeque? A. I was introduced to him by a friend in a restaurant.

Q. Was the friend in the same business? A. I don't know whether he was in the same business with LeVeque or not, but I guess he had been.

Q. Did you begin doing this rum business with LeVeque right after the introduction? A. No, not right after the introduction.

Q. How long after? A. Five or six months.

Q. And you continued it up to 1931 or 1932? A. No, not all the time. I worked for him approximately a year, or eight or ten months.

593 Q. Had you been in that business before? A. Just a minute—before when?

Q. Before 1927. A. No.

Q. That was your first venture? A. No.

Q. What is your answer? A. I was in a schooner, a sail-ship for Crowell & Thurlow of Boston, Massachusetts, and took a load of liquor into Port Newark.

Q. Over here in New Jersey? A. Right.

Q. When was that? A. First part of 1927.

Q. Was that your first venture at that time? A. My first venture.

Q. How old are you? A. 47 going on 48.

594 Q. Were you a partner of LeVeque? A. No.

Q. Were you on a salary or percentage? A. Salary.

Q. Did you have a master's license then? A. Yes.

Q. Were you ever convicted of a crime? A. No.

Q. Were you indicted in this case? A. Not as I know of. I was never told so.

Q. When did you last see LeVeque? A. I saw LeVeque about a month and a half ago.

Q. You didn't see him within the last week? A. No, sir.

Q. When have you communicated with LeVeque, directly or indirectly? A. Let's see, I telephoned LeVeque, I was here in New York about a month and a half ago, and I was



*Fred G. Velez—For Government—Cross.*

called by Mr. McKnight up to the Federal Court Building, and he gave me a subpoena and when I got there I found LeVeque there. 595

Q. Did you talk about this case? A. Certainly we talked about the case, certainly. He asked me if I was going to testify and I told him, yes.

Q. What did he say about himself? A. He didn't say anything about himself. We were there only a few minutes.

Q. Where was this? A. In Mr. McKnight's office.

Q. Were you shown the minutes of the last trial, the testimony written out? A. Some of it, we went over it.

Q. When you say "we," whom do you mean? A. Mr. McKnight and myself. 596

Q. Were any others there? A. No.

Q. Did you ever talk with any representative of the Government about the fact that you had a license as a master? A. If I had a talk——

Q. With any representative of the Government that you had a license as a master? A. All the Government officials I knew, knew that I had a license as a master.

Q. How did they know? A. They asked me when I was arrested on account of the Southern Sword.

Q. Did they ever discuss with you the effect of a conviction of a crime on your license?

Mr. Dunigan: I object to that, outside the issues. 597

The Court: Sustained.

Mr. Cahill: Exception.

Q. What did any representative of the Government say to you as to what would be done respecting any part that you had played in the crime alleged in this case? A. They didn't tell me what would take place, they said, "It looks bad for you." I told you the conditions. I answered the questions the District Attorney asked me, and he told me it looked bad for me.

*Fred G. Velez—For Government—Cross.*

Q. Who told you that? A. Mr. William Dunigan.

Q. Of the Alcohol Tax Unit? A. Yes, and Mr. William Gray. They were cross-questioning me the day I was down there.

Q. Did they say it looked bad for you? A. They didn't seem to believe me when I said I was in good everywhere in the record.

Q. Did they tell you what they meant, what the effect might be on you? A. No, they didn't tell me what the effect might be on me if I was convicted.

Q. What did you know would be the effect? A. My license would be suspended, or I would be jailed or fined.

Q. Did you know your license might be taken away? A. No.

Q. That consideration was in your mind at the time? A. Undoubtedly, yes.

Q. You are sure of it, aren't you? A. Probably it was in my mind, it had to be, could not be anywhere else.

Q. Wasn't it the thing you were most interested in at that time? A. No.

Q. You didn't know of any special interest you had in your license—wasn't it an important consideration in your mind at the time? A. It was.

Q. How many times have you been examined by the representatives of the Government? A. I went down to Pine Street, the Federal Bureau of Investigation, four or five times.

Q. Recently? A. No, two years ago.

Q. Recently, how many times have you been there? A. Once since the trial of two years ago.

Q. When was this recent trip? A. A month and a half ago, and Mr. McKnight questioned me.

Q. When did you get in town on this present trip? A. Yesterday morning about seven o'clock.

Q. Did you talk with any representative of the Government since? A. Yes, Mr. McKnight and Mr. Dunigan.

*Fred G. Velez—For Government—Cross.*

Q. About the case? A. Yes, about the case.

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Q. Did you again go over the minutes of the last trial?

A. No, there were a few questions he asked me if I could remember possibly.

Q. Some of it? A. Some of it.

Q. The minutes were written out? A. He had a book there and was questioning me from the book.

Q. A book like this (indicating)? A. No.

Q. A similar book? A. Yes, that's it.

Q. Before you testified at the last trial you had made a statement as to all of the facts that you recalled in connection with the Southern Sword transaction, had you not? A. No, I didn't know all the facts.

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Q. Weren't you asked all that you knew? A. I don't think so.

Q. Were you asked to state part of what you knew? A. I was asked to answer certain questions of what I knew about LeVeque.

Q. As you sit there do you mean to say you didn't tell all the facts? A. Many of the things they could have asked I didn't tell, they didn't ask me.

Q. Weren't you asked to tell all you knew about the case? A. Yes, but I only answered the questions they asked me.

Q. Were you holding back anything relating to the facts of this case, particularly with regard to the Southern Sword?

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A. Well, there were some things that I knew that I didn't tell, but they didn't ask it so I didn't tell it.

Q. You noted it in your mind? A. I did.

Q. I call your attention to some of the testimony I am referring to now, to page 213, the testimony of this witness at the other trial. Suppose before we call his attention to it—

Mr. Dunigan: We object to it on the ground no foundation has been laid as yet for the impeaching of this witness by any prior testimony.

*Fred G. Velez—For Government—Cross.*

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Mr. Cahill: I can surely question him on testimony he has heretofore given.

Mr. Dunigan: Suppose you follow the rule and show there is inconsistency. We object to reading from the testimony at this time on the ground no foundation has yet been laid for the impeachment of this witness.

The Court: Objection overruled.

Q. Do you remember being asked this question at the last trial:

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"Q. How long did it take you to load at sea near Winter Quarter Lightship; about the same time? A. Approximately the same. Not over three hours."

Do you remember that? A. Right.

"Q. Did you accompany the Southern Sword on to Bridgeport? A. Yes."

Q. Do you remember that? A. Yes.

"Q. During the time that you had been on the Southern Sword before had you had occasion to go up the North River before? A. No, sir."

Q. Do you remember that? A. Right.

"Q. This was the first time, so far as you know, that it had gone up the North River? A. Yes, sir.

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"Q. By the North River you mean what is known as the Hudson River? A. The Hudson River.

"Q. When you got to Bridgeport on the Southern Sword, did you come back on the boat to New York? A. No.

"Q. Came back by train? A. Came back by train about three days after.

"Q. Did you see Callahan after you came back? A. Yes, I went up to his office.

"Q. Did you have a conversation with him? A. No. I went up to get my mail.

"Q. Did he say anything to you at all? A. No, sir." A. I don't know.



*Fred G. Velez—For Government—Cross.*

Q. You don't know whether you did or not? A. As Cal- 60  
lahan said nothing to me?

Q. I will read it again:

"Q. Did you have a conversation with him? A. No, I  
went up to get my mail.

"Q. Did he say anything to you at all? A. No, sir." A.  
I must have misunderstood that question.

Q. If you gave that answer then at the last trial it was  
incorrect? A. I didn't give any answer that was incorrect.  
I told the truth, all that I could possibly tell.

Q. If that answer was taken down, it was incorrect? A.  
It must have been.

"Q. Where did you go after you left his office? A. I 60  
went up to see LeVeque, in the Belford Restaurant."

Q. Do you remember being asked that question and giv-  
ing that answer? A. No, sir, I went up to LeVeque's house,  
went up to see LeVeque.

Q. Didn't you see these minutes in the office of the United  
States Attorney from which they came when you were there?  
A. No, I did not.

Q. I am reading from minutes produced by Mr. Dunigan.  
A. Sure.

Q. I will read that last answer: "A. I went up to see  
LeVeque in the Belford Restaurant.

"Q. Did you see Mr. LeVeque with any others? A. Nar- 60  
done was there.

"Q. Yes. Was he there when you were talking? A. Yes.  
And Red Saunders. I went up there to see who owned the  
cargo, if I could find out who had the cargo."

Did you testify to that? A. Yes, sir.

"Q. Did you see the defendant Gottfried up there? A.  
No, sir, but I understand a man named Gottfried came into  
the restaurant just at the time after the men came in.

"Q. Which man do you mean? Point him out. A. That  
man to the left (indicating). The last man to the left.



*Fred G. Velez—For Government—Cross.*

610

"Mr. Dunigan: Indicating the defendant Robert Gottfried.

A. (Continuing.) Yes.

"The Court: Where did you see him?"

"The Witness: In the restaurant, Belford Restaurant.

"Q. Belford Restaurant? A. Yes."

Q. Do you remember testifying to that? A. Yes.

611

Q. The Belford Restaurant is repeated in a question you answered first? A. Yes.

"Q. He came there? A. He came there while the men were in there.

"Q. Yes. When you got there you saw LeVeque and Nardone and Saunders there? A. Yes."

Q. What happened; what was done at the time? A. As we went there?

Q. Yes. I will read this:

"The Witness: I asked Mr. LeVeque who had the cargo on the Southern Sword and he said, 'Where were you, Captain?'—do you remember testifying to that effect?

612

A. Yes, may I ask the attorney something? Where was that when he asked me that?

Q. I have read to you all of the preceding testimony. A. That was not in the Belford Restaurant.

Q. You haven't said so in this testimony, have you? A. That question was asked in LeVeque's house when I went up there to his house to see him.

Q. I am reading from the United States Attorney's copy. A. There must be something wrong with questions asked.

Q. Just at that point? A. All right.

*Fred G. Velez—For Government—Cross.*

Q. Some of it is correct. You have answered with practically one exception that it was all correct. A. There is a mistake regarding going from Callahan's place to LeVeque's house. I went from Callahan's place to LeVeque's, and from there to the Belford when I got arrested. 613

Q. And that was the only mistake up to this place where it states you went to the Belford Restaurant from Callahan's place? A. Yes.

"The Witness: I asked Mr. LeVeque who had the cargo on the Southern Sword and he said, 'Where were you, Captain?' He said, 'Where were you?' I said I was third mate on the Southern Sword. He said, 'On the Southern Sword?' I said, 'Yes.' I said, 'Who had that cargo? He had that cargo.' He said, 'The cargo came in light.' I said, 'You got 1600 cases through the night.'" 614

Q. Do you remember that testimony, and he said, "No, Captain, we did not," do you remember that? A. That LeVeque said, "No, Captain, we did not?"

Q. Yes. A. He probably did. He must have said that or I wouldn't have said it.

"I said, 'Yes, you did. Somebody got 1600 cases Tuesday night.' I said, 'Who had the cargo?' He says he sold the cargo," is that right? A. That is right. 615

Q. LeVeque said he sold the cargo to somebody? A. Yes, to a party.

Q. "And was going to send us our supplies and deliver them", is that correct? A. I don't understand that.

Q. Do you remember that? A. No.

Q. Have you any recollection about it? A. No.

"I said, 'So far nobody on the ship had any money'—this was Friday—and the cargo was delivered Tuesday!"

Q. Do you remember that? A. The cargo was—

*Fred G. Velez—For Government—Cross.*

616 Q. I will read it again— A. No, no, the cargo was delivered Monday.

"I said, 'So far nobody on the ship had any money'—this was Friday—and the cargo was delivered Tuesday.'"

A. That is right.

"Before he told me—he had finished the conversation the Government men came in and seized us." A. Yes.

Q. Then the Court asked you a few questions:

*"By the Court:*

617 "Q. Who was there during this talk? A. Mr. LeVeque, Mr. Nardone and—what is his name—Red Saunders.

"Q. Yes. A. And George Geiger."

Did you testify to that? A. Yes, sir.

618 "Q. Anybody else? A. No, sir; nobody as I know of. There were some other people in the restaurant that day, but I did not know them." A. There is something wrong with it there, because I went to LeVeque's house and from LeVeque's house I went to the restaurant, and in LeVeque's house when I told him he had the cargo on Tuesday, and this was Friday, there was only Red Saunders at LeVeque's house, and from LeVeque's house we went down to the Belford Restaurant and the conversation we went over is mentioned there.

Q. Was it true, as you said in that testimony, that LeVeque told you he had sold the cargo to somebody? A. That is right, that he had sold the cargo.

Q. At no time in the previous trial did he say this cargo was sold to Nardone? A. No, he didn't say it was sold to Nardone.

Q. Do you now say it was sold to Nardone? A. No, he never did say it was sold to Nardone.

Q. He never told you to whom it was sold? A. He told me it was sold, but not to Nardone. He didn't say who it was sold to.

*Fred G. Velez—For Government—Cross.*

Q. You told us here today you were told that the persons for whom this cargo was intended, the owners of the cargo, were men named Edmond and Gottfried; who told you about Edmond and Gottfried? A. What cargo? 619

Q. The cargo of the Southern Sword. A. We never mentioned the names Edmond and Gottfried. When I went out to see Callahan he told me that the men that came up there to see him regarding this cargo were men named Edmond, and Gottfried.

Q. You didn't know them? A. No.

Q. Didn't you testify here this morning that somebody told you that Edmond was a certain person? A. Yes, LeVeque told me that Nardone went to Callahan in the name of Edmond. 620

Q. You didn't testify to that at the last trial? A. I probably was not asked that question.

Q. Did you tell the representatives of the Government who Edmond was? A. No, I was not asked.

Q. For the first time you have stated here that Edmond was Nardone? A. I don't know if Edmond is Nardone.

Q. For the first time you have testified here today that you were told that? A. Yes, LeVeque told me that Nardone went to Callahan in the name of Edmond.

Q. And you never brought out that fact until you got on the stand today? A. No. 621

Q. And you don't know who Gottfried was? A. No, I never saw the man in my life until we were arrested.

Q. You never heard Nardone referred to as Edmond? A. No, at no time.

Q. Your purpose in going to the Belford Restaurant on the day of the arrest was to collect the thousand dollars, wasn't it? A. LeVeque told me, "Captain, if we give you some money, or a thousand dollars, don't say who owns the cargo."

Q. You agreed to take the thousand? A. Yes.

*Fred G. Velez—For Government—Cross.*

622 Q. And not to reveal who the cargo belonged to? A. No.

Q. And that is why you were in the restaurant on that day? A. That is right.

Q. You never got the cargo? A. No.

Q. You had been dealing with Callahan in the effort to get a boat for LeVeque? A. Yes.

Q. And you had made representations to Callahan as to what they wanted to do with it, and so on, had you not? A. Right.

Q. And you were willing to cheat Callahan if they gave you a thousand dollars? A. Yes, the reason for that was I saw nobody was going to get any money.

623 Q. Did you think when you went to the Belford you were not going to get a thousand? A. I didn't think I was not going to get it. Nobody knew who was to get anything. Callahan didn't know.

Q. Didn't you expect a thousand dollars? A. Yes.

Q. You entertained a happy hope you would get a thousand dollars that day? A. That is right.

Q. And you were going to get that for yourself and not divide it with anybody? A. Absolutely, I was going to keep that for myself.

*Cross-examination by Mr. Halle:*

624 Q. How many times had you seen LeVeque in these negotiations for the boat either at the Astor Hotel or at the Belford Restaurant? A. How many times?

Q. Yes, about. A. I should say, roughly, 15 or 16 times.

Q. And during a period of how long did that take? A. Approximately two months.

Q. And during that time you say you saw different people with LeVeque whom you have named here today? A. Right.

Q. At any of these times either at the Hotel Astor or at the Belford Restaurant did you see the defendant Robert Gottfried? A. Never.



*Fred G. Velez—For Government—Cross.*

Q. Had you ever seen him in your life before? A. Never seen him in my life until I was arrested in the Belford Restaurant.

Q. When you talked about these two names, Edmond and Gottfried, you said you knew nothing at all except that it was a name? A. I told the captain, "You cannot go by the names, the chances are they are not the right names."

Q. And you knew nothing at all about that except there were the two names? A. Yes, and it could be anybody. To the best of my recollection the names on the paper shown me was Edmond and Gottfried.

Q. Do you know how Gottfried was spelled? A. I would spell it G-o-d-f-r-e-y.

Q. Do you know how it was spelled on the paper? A. I wouldn't be sure. It could be G-o-f-f, or G-o-t-t, anyway.

Q. You wouldn't say it was G-o-d-f-r-e-y? A. I wouldn't say. That was the name I recall.

Q. The only time you saw this defendant Gottfried was when the arrest took place, and you were taken downtown and Gottfried was taken downtown? A. While we were being arrested that man came into the restaurant. We were arrested before Gottfried came in.

Q. You were arrested before Gottfried came in? A. Yes, sir.

Q. And were all arrested before Gottfried came in? A. Yes, Gottfried was arrested after everybody was arrested.

Q. You didn't know who he was? A. No, I had never seen him before.

*Cross-examination by Mr. Climenko:*

Q. As I understand your situation in the latter part of 1935; you looked for LeVeque? A. Right.

Q. And at that time you were in need of employment and you had knowledge of LeVeque's activities? A. Right.

*Fred G. Velez—For Government—Cross.*

628 Q. And you also held a license from the United States Government? A. Right.

Q. To act as a master of a ship? A. Right.

Q. Holding that license you asked Mr. LeVeque to give you illegal employment, is that right? A. No.

Q. You told me that. A. No, that would not involve the United States; I would not be working in the United States.

Q. You were not asking Mr. LeVeque for employment that would be illegal as to the United States? A. I don't know why it would be illegal to the United States. That would be a question.

629 Q. Is it a question, or is it a question you have solved as being illegal? A. I don't think it would be illegal.

Q. You knew then it would not be illegal? A. No, not if I got the job I wanted.

Q. Up to that point had you thought of it in your mind when you sought Mr. LeVeque? A. Sure.

Q. So that when you applied for that job as a man holding a license you were asking him to give you a job to bring alcohol up to certain waters on the coast, and you thought that was legal? A. Yes.

Q. That was not illegal? A. No.

630 Q. And to this day your mind is not bothered by that transaction? A. No.

Q. Whatever the mental effect might have been to you at that time with respect to the job you were seeking, you did at a subsequent time load alcohol? A. Yes.

Q. Did your mind suffer at that time any conflict with respect to legality concerning the license the United States gave you? A. Why, certainly.

Q. You did suffer by reason of that transaction? A. That is right.

Q. And you were now suffering, mental suffering, which you had found out? A. Yes.

*Fred G. Velez—For Government—Cross.*

Q. What was the nature of the mental suffering you then experienced? A. I don't quite understand. 631

Q. You just told me you suffered a conflict between your mental activities on the circumstance that you held a license from the United States Government; now I am interested in having you describe to us the mental conflict you were then suffering from.

The Court: If he can do that he is a much better man than I am.

Q. Did you suffer anything mentally by reason of that transaction? A. Which transaction? 632

Q. I am referring to your importation of alcohol into the United States. A. On that one time, yes, I suffered mentally.

Q. You did suffer mentally? A. Yes.

Q. You suffered mentally by reason of the fact that you felt you were participating in a wrongful act? A. Right.

Q. And an act directly inconsistent with your duties as a holder of a United States license? A. Right.

Q. That was directly in your mind? A. Yes.

Q. Later on you suffered also a mental conflict with respect to a thousand dollars? A. No.

Q. That transaction whereby you sought to obtain for yourself a thousand dollars, that never presented any mental conflict? A. No. 633

Q. Never did? A. No.

Q. And even at this time as you talk of that transaction to us, that transaction where you tried to get a thousand dollars by refusing to reveal facts to Callahan, even at the present time that transaction does not cause you to suffer mentally? A. Absolutely not. I thought I would be right to take it. I would not have gotten anything anyway.

*Fred G. Velez—For Government—Cross.*

634 Q. Whether you would have gotten anything anyway, you say it would be perfectly all right between you and your conscience? A. I would feel all right if I got it.

Q. No question about it? A. No question about it.

Q. You entered into an arrangement with LeVeque whereby alcohol was to be brought into the United States?

A. I knew he was bringing it in and I didn't bring any alcohol for LeVeque, and I was not bringing in alcohol for LeVeque.

Q. You brought in alcohol on the Southern Sword? A. That was a different situation. I didn't know I was going to bring in alcohol when we left Newport News.

635 Q. You talked with LeVeque about giving you a job, about bringing in alcohol? A. But that was not bringing it into the United States.

Q. You tried to get from Callahan a ship that would bring it in? A. Right.

Q. You did that in the hope of getting a profit for yourself? A. Undoubtedly, but not bringing it in.

Q. Whether or not you brought it in you did those things so as to get some compensation for yourself? A. Later on. I had no specific agreement, but I had to get some compensation for it.

636 Q. Referring to your discussions with LeVeque, they carried on from the latter part of 1935, until the middle of March, 1936, is that right? A. That is right.

Q. And they ceased only at a point where if you were not arrested you were at least taken into the custody of a Federal man? A. Right.

Q. That is when they stopped? A. I don't know whether they stopped then.

Q. I am talking about your activities; cannot you answer that? A. You said they stopped.

Q. "They" refer to your activities? A. They don't refer to my activities.

*Fred G. Velez—For Government—Cross.*

Q. You stopped only when you were taken into the custody of a Federal man? A. That is right. 637

Q. So that for five or six months you were engaged in discussions with respect to bringing in alcohol? A. Before or after?

Q. Before March 16, 1936. A. That is right.

Q. You were not indicted in this case, were you? A. Not that I know of.

Q. How do you explain that?

Mr. Dunigan: We object to that.

The Court: Sustained.

Mr. Climenko: Exception. 638

Q. But the fact is that you have not been indicted in this case? A. I don't know, I don't think so, I have not been told that I was.

Mr. Climenko: Mr. Dunigan has said that you have not been indicted.

Q. To refresh your knowledge of this transaction a little further, do you know whether or not you have been named as a co-conspirator in this transaction? A. I don't know whether I was or not. 639

Q. And you have never had occasion to find out? A. No.

Q. Never asked anybody? A. No.

Q. Never discussed that aspect of this matter with anyone? A. No.

Q. You say that on various occasions you met certain people, is that right? A. Yes.

Q. You went to certain restaurants? A. Yes.

Q. Which restaurants did you go to? A. I went to the Normandie Restaurant and to the Belford Restaurant with the parties involved here.



*Fred G. Velez—For Government—Cross.*

540 Q. And you say that on one occasion or several occasions you saw Mr. Nathan Hoffman? A. Yes, I saw Nathan Hoffman.

Q. When, for the first time, did you see Mr. Nathan Hoffman? A. I saw him in the Normandie Restaurant for the first time around the middle of November, last of November, 1935.

Q. Could you give me a date? A. No, I cannot, I never kept a record of them, there were so many different times, I never kept a record.

541 Q. With whom did you go to the Normandie Restaurant the first time? A. With LeVeque. I never knew the others until I met them with Mr. LeVeque. I used to go over to have dinner with him.

Q. You went for the first time and say you met Mr. Hoffman? A. I won't say I met Mr. Hoffman. Mr. Hoffman came after I was there.

Q. About what time was this? A. In the afternoon.

Q. At what time? A. Around one or two o'clock.

Q. What was the location of this restaurant? A. 46th Street, between 8th and 9th.

Q. Did you engage in a conversation with Mr. Hoffman? A. No, I never had a conversation with Mr. Hoffman.

542 Q. Do you recall anything Mr. Hoffman said on that occasion? A. No, I couldn't say positively. Nardone, LeVeque and Hoffman were at the table. They talked about different things. They weren't telling me but I was present and overheard the conversation.

Q. What did Mr. Hoffman say? A. I couldn't say positively, I don't remember what he said regarding the Pronto and the Isabel H.

Q. Can you remember anything at all that he said? A. Nothing specifically regarding any exact words, any more than he would join in the conversation.

*Fred G. Velez—For Government—Cross.*

Q. What do you mean by "join in the conversation"? 643

A. He joined in the conversation with LeVeque and Nardone.

Q. What did he say? A. He joined in where the Isabel H was and where the Pronto was, and how much of a bill they were paying up in Nova Scotia for the Isabel H, and the bill on the Connecticut coast for the Pronto.

Q. That is what Mr. Hoffman said? A. I couldn't say that Mr. Hoffman said anything special.

Q. Did Mr. Hoffman ask any one of these questions which you incorporated in your last answer? A. Asked who?

Q. I don't know—asked who—you were telling me about a conversation, you were there.

644

Mr. Dunigan: We object to arguing with the witness.

The Witness: He didn't ask any questions, but they were all talking about the same thing. There was no special question. They would ask anything.

Q. What did Mr. Hoffman say? A. I don't remember.

Q. Do you remember anything he said? A. No.

Q. When was the next time you saw him? A. Three or four days after.

Q. Where? A. In the same place.

Q. What did he say on that occasion? A. I don't re- 645  
member that either.

Q. Do you remember anything at all Mr. Hoffman said?  
A. Nothing more than the conversation, the general expenses of the boats.

Q. What did Mr. Hoffman say on that occasion? A. I don't remember what he said.

Q. When is the next time you saw him? A. Three or four days after.

Q. What did Mr. Hoffman say on that occasion? A. I don't remember what he said.

*Fred G. Velez—For Government—Cross.*

646 Q. You don't know? A. If I knew I would tell you. The reason I cannot tell is because I don't know, that is right, I don't know.

*Cross-examination by Mr. Nolan:*

Q. How old are you? A. 47.

Q. How long have you had a master's license?

The Court: Please don't go over any of the other cross-examination. There has been testimony as to his age and the antiquity of his license.

647 Mr. Nolan: I have no intention of wasting any time.

The Court: I don't say you have.

Mr. Nolan: I am only repeating it for a particular reason.

The Court: All right.

Q. How long have you had a master's license? A. 20 years.

Q. For steam? A. For sail 20 years and for steam about 15.

648 Q. Before you had a master's license did you have a license for mate? A. Yes, master for steam and mate for steam.

Q. You have had a master's license for 20 years? A. Yes.

Q. And you are only 41 now? A. 47.

Q. As mate, 24? A. Approximately 24-25.

Q. What vessels prior to 1927 were you master of? A. 1927, I was master of the freighter Thurlow, I was master of a schooner for Crowell & Thurlow, I was master of the Isabel Parmentier for Emory, Fitkin & Company.

Q. All sailing vessels? A. Yes.

*Fred G. Velez—For Government—Cross.*

Q. Crowell & Thurlow are sailing vessels only? A. Right. 64

Q. Were you master of any steam vessel prior to 1927?

A. No.

Q. After 1927 and up to 1936, were you master of any steam vessel? A. In 1935 I was master.

Q. Were you ever master of a vessel called the Doctor?

A. No.

Q. Ever master of a vessel called the Beatrice L? A. No.

Q. Did you ever work on a vessel called the Doctor?

A. Yes.

Q. Did you ever work on a vessel called the Beatrice L?

A. Yes.

Q. The Beatrice L was named for Mr. LeVeque's daughter? A. I understood it was. 65

Q. How long have you known Mr. LeVeque? A. Since 1927; 12 years now.

Q. And you have been engaged with him in the rum-running game? A. Off and on.

Q. And the vessel I have just named, named after his daughter, was in the rum-running game? A. Yes, but I was not captain of her.

Q. In this case you went to Mr. LeVeque in 1935 and asked him to give you a job? A. That is right, asked him if he had anything.

Q. Bill Thurlow had not just got rid of you in 1935 for your rum-running activities, had he? 66

The Court: Do you mean discharged him?

Mr. Nolan: Yes.

A. No, I didn't work for him in the fall of 1935.

Q. You were out of a job in 1935? A. That is right.

Q. And you came to LeVeque and asked him for a job?

A. That is right.

Q. In the rum-running business? A. Yes.

*Fred G. Velez—For Government—Cross.*

652 Q. Just before you went to LeVeque had you been talking to Geiger? A. I knew Geiger six or seven years, just before I went to LeVeque in 1935?

Q. Yes. A. No, I never saw Geiger until after I met LeVeque.

Q. Geiger and his family and your family had been friends for a number of years? A. No, none of them had ever met my family except LeVeque.

Q. If Mr. Geiger testified here—he was the first witness in this case—if he testified he and his family had been friends of yours and your family for a number of years would that be true?

653

Mr. Dunigan: I object to that; there is no such testimony.

Mr. Nolan: Geiger did testify to that.

The Court: I don't recall whether he did or not.

A. I didn't meet Geiger's family, I met Geiger's wife once, but I don't think Geiger met my wife, though he had my address and telephone.

654 Q. You were only third mate on the Southern Sword, weren't you? A. I was third mate and chief mate, alternating. One time I was third mate and then I was chief mate, then I was third mate and chief mate again. I was third mate twice and chief mate twice.

Q. That was within what time? A. A month and a half, approximately.

Q. When the Southern Sword arrived in Bridgeport you came on to New York as you have testified, you went into the office of Callahan? A. Right.

Q. Did you talk with Mr. Callahan? A. I did.

Q. And you have given today a conversation which you had with him on that occasion? A. That is right.



*Fred G. Velez—For Government—Cross.*

Q. The last time you testified in this case did you testify to that conversation? A. I think I did. If it was asked I did. 655

Q. Page 214 of the Commissioner's record:

"Q. Did you see Callahan after you came back? A. Yes, I went up to his office.

"Q. Did you have a conversation with him? A. No. I went up to get my mail.

"Q. Did he say anything to you at all? A. No, sir.

"Q. Where did you go after you left his office? A. I went up to see LeVeque, in the Belford Restaurant."

Is that true? A. No, there is something wrong there with the copying or writing. I saw Callahan and I went up from Callahan to see LeVeque. That is not correct. 656

Q. But that is the official record? A. It might be official, but it is not correct; it could be the official record, but it is not correct.

The Court: How does he know it to be official or not?

Mr. Nolan: I will go over it with respect to my particular client.

Q. Did you consider yourself a partner of LeVeque? A. Never did. 657

Q. You expected somebody to pay you? A. Well, when we left Newport News I did not know what I was going to get, but after we got the cargo in, I expected something.

Q. Didn't you say this morning that if you sold the boat you didn't want to be paid anything? A. Not only selling the boat but if we made a deal and took the liquor in, that Callahan didn't have to pay me anything.

Q. You were working with the idea of getting liquor in? A. No, I was working with the idea of getting a commission.

*Fred G. Velez—For Government—Cross.*

658 Q. Did you testify the conversations with reference to boats, or anything like that, was more particularly between LeVeque and you? A. Well, no, unless I was asked a question with respect to both businesses.

Q. Didn't you consider yourself a partner with LeVeque in the rum-running business? A. No, never did, and never was.

*By Defendant Brown:*

Q. When you applied for the job on the Southern Sword you knew the Isabel H was at sea with a cargo of liquor? A. That is right.

Q. You knew it at the time? A. I knew it at the time when I applied for a job, is that what you mean?

Q. Yes. A. When I applied for a job to whom?

Q. You are not asking me questions.

The Court: He has to understand your questions; what time do you mean?

Defendant Brown: I asked when he applied for a job.

660 The Court: He has testified here he practically applied in several places to several people. What do you mean?

Defendant Brown: On the Southern Sword, your Honor.

The Witness: He means that I applied for a job with Mr. Callahan on the Southern Sword.

Q. And at that time you knew the Isabel H was at sea with a cargo of liquor? A. Yes.

Q. When did you come from the West coast in 1935? A. I came from the West coast in 1935, around October 8th or 9th.

*Fred G. Velez—For Government—Cross.*

Q. At the last trial you stated December 15th. A. That 661  
could not be—around December 15th.

The Court: You must not make statements of fact that way.

The Witness: I was paid off on the Eastern Glade on October 15 in New York. I left the West coast in September. There was a three months' marine strike.

Q. How long were you on the Southern Sword? A. It could be a month rightly.

Q. Where do you say you joined the ship? A. I joined 662  
the Southern Sword in Bridgeport.

Q. Who was master on the ship when you joined it?  
A. When I joined the Southern Sword there was no master.

Q. You were supposed to act as master, you were chief mate then. A. I went on as chief mate. After I got out there I found you were master, Pendleton was not going on the ship, and Mr. Brown, the chief officer, was going as master.

Q. You mean to say you joined the ship when Captain Pendleton left? A. Yes.

Q. Who drove you over to the ship? A. I took a train to Bridgeport and took a taxi down. It was raining, snow- 663  
ing and wet.

Q. Had you ever seen me before you joined the ship?  
A. No, never.

Q. Had you ever heard of me? A. No, never heard of you.

Q. Have you ever worked on the Isabel H? A. No, not on the Isabel H.

Q. Do you deny you ever worked on the Isabel H? A. I never worked on the Isabel H, I worked on the Doctor and Beatrice L, I was super-cargo on the Doctor and the Beatrice L. I never was captain of those boats.

*Fred G. Velez—For Government—Cross.*

- 664 Q. What nationality are those ships? A. English.
- Q. Have you ever received any money from Mr. LeVeque?
- A. For what case?
- Q. Any money at all. A. I received a lot of money from Mr. LeVeque.
- Q. Always good pay? A. Sure, what I call good.
- Q. Now, when you say you had conversations and was promised a job on this ship a long time before you joined it— A. On what ship, Captain?
- Q. On the Southern Sword. A. Right.
- Q. Was there any discussion about it that I was going to be fired and you had to take my place? A. It never
- 665 was mentioned that you were going to be fired.
- Q. Weren't you asked what license you had and at that time your license was not big enough to command the Southern Sword? A. My dear man, I can prove that it is. Do you want to look at it again?

The Court: Do you want to look at it?

Defendaht Brown: I would like to see it, yes.

- Q. How could you take charge of the Southern Sword running through New York, where is your pilot license? A. I don't have to have a pilot license to go as master.
- 666 Q. Not to go as master, but you would have to have it if you went to— A. I didn't have to go on that ship.
- Q. Isn't it true LeVeque said, "Captain Brown doesn't know anything about bootlegging, and we can fool him"?
- A. No.
- Q. I came out of the House of Detention a year ago, didn't I? A. I think so.
- Q. Have you been to LeVeque in the last year? A. Yes, I saw LeVeque.
- Q. Did LeVeque tell you when I came up to him? A. I think he did.

*Fred G. Velez—For Government—Cross.*

Q. Did LeVeque tell you what he told me in regard to you? A. (No response.) 667

Q. He didn't mention me then, if he told you anything about it? A. He didn't mention you.

Q. Did he tell you how much money you were getting? A. How much I was getting?

Q. Yes. A. I wished I was getting something then. I would not have been in as bad a fix as I was.

Q. You knew that the Isabel H had liquor in her? A. I did.

Q. When that boat came alongside the Southern Sword and during that night I had you called? A. Right.

Q. I sent a lookout down to call you? A. That is right. 668

Q. You came on the bridge? A. That is right.

Q. And didn't I say in the hearing of the Quartermaster, "Go down there and see what that is"? A. Yes, "Mr. Velez, go down and see what that is."

Q. And you did go down? A. Yes.

Q. And you heard— A. "Hello, Harry."

Q. That is the first thing you said? A. Yes.

Q. And they said, "Is that the Southern Sword, is that Captain Brown," is that right? A. I never heard them say that.

Q. Did you say, "Hello, Harry"? A. Yes. 669

Q. I didn't give you orders to investigate that? A. You did not.

Q. In the hearing of the Quartermaster? A. You didn't have to give orders.

Q. I did, and that is what you are for; what is the duty of the mate? A. The duty of the mate is to exercise the legitimate orders from the master.

Q. And it is the mate's duty when he finds anything amiss to make an immediate report to the master? A. Right.



*Fred G. Velez—For Government—Cross.*

670 Q. And you knew there was liquor on that ship? A. And it is pretty bad that Captain Brown didn't know.

Q. I didn't know. A. I know you didn't.

Q. I didn't know. A. You were not quite that naive to know, I suppose, and should be excused for that.

Q. And didn't you go aboard the Isabel H? A. I did.

Q. And you shook hands with the whole crew? A. Not the whole crew. I knew three men.

Q. You knew the officers? A. I knew the captain, the super-cargo, and one of the sailors on there was with me on the Beatrice L.

671 Q. I stayed on the bridge, didn't I? A. Yes, to the best of my knowledge, you were on the bridge all the time.

Q. We were not stopped? A. No.

Q. We were going slow? A. Slow is right.

Q. I was on the bridge attending to the navigation of the ship? A. That is right.

Q. And I hollered from the ship; "Mr. Velez, what is that," in the hearing of the Quartermaster?

The Court: Is that a question, Captain?

672 Q. And what was your answer? A. Captain, don't you think that seems ridiculous?

Q. What was your answer—never mind what your opinion is. A. I don't remember your hollering to me.

Q. Didn't you say 1,600 cases? A. To whom?

Q. To me. A. I don't remember; probably I might have told you how much we had.

Q. And I asked in the hearing of the whole crew, I won't say the whole crew because some of them may still be down, 1600 cases of shellac? A. Oh, Captain, that is ridiculous.

*Fred G. Velez—For Government—Cross.*

The Court: I have to instruct the jury that the statements of fact made by Captain Brown or for him when he is not under oath, you may disregard. You may, when he is under oath, but I do that as a precaution. 673

Q. And didn't you also say, "This is all right, Captain, I know these people"? A. I might have said that when the boat came alongside. I probably said to you, "I know who owns the cargo."

Q. Didn't you say, "This is all right, Captain; I know these people"? A. No, I did not.

Q. Not after you shook hands with them? A. I didn't tell you that. 674

Q. And didn't you say, "I have been on this boat, Captain"? A. I have been on the Isabel H.

Q. You admit you have been on the Isabel H? A. In ports, Captain, in Nova Scotia. I have not been at sea in her.

Q. How could you be on an English ship? A. I could not. It is not an American ship, it is a British boat, and so is the Doctor a British ship.

Q. I couldn't see in the dark.

Mr. Dunigan: I have not attempted to interrupt, but under the circumstances I think the Court should instruct him as to the situation. 675

Q. Arriving in Bridgeport, didn't you sneak away from the ship without telling me or telling the second mate where you were going? A. Ridiculous, I did not.

Q. Who did you tell? A. Told nobody. I didn't sneak away from the ship. Once the ship got to Bridgeport, Captain Brown went to New York, and we didn't get information from him.

*Fred G. Velez—For Government—Cross.*

676 Q. Isn't it true I left 24 hours after you did? A. Ridiculous. When I came to Callahan's office you were in there. You went to New York from the ship's dock.

Q. Wasn't Captain Callahan in Bridgeport when you left? A. No, sir, not when I left, Mr. Callahan was not in.

Q. I mean Captain Pendleton. A. Right.

Q. After you were taken in for questioning, did you see Pine Street, or wherever it was, where did you go? A. Where did I go?

Q. Yes. A. From Pine Street I think I went up to LeVeque's place.

677 Q. No, sir, didn't you go to Callahan's office? A. It may be, that was right across the street.

Q. One is in 50 Broad Street and the other on Pine Street? A. I don't remember, I went to Callahan's office, I don't remember, that same evening or the next day.

Q. It was the same evening, and wasn't I sitting on the sofa there? A. Probably you were, you were not on the boat.

Q. You didn't speak a word to me, you went into another office, you never said one word to me? A. Probably not.

678 Q. You had already been questioned by the Government people, had you not? A. I was not questioned very much the first day by the Government. I was told to come back. They questioned me on a few subjects, found out what boat I had, and told me to come back the next day.

Q. You had been questioned? A. Yes, I had been.

Q. And you didn't say one thing to me about it, not one word? A. I didn't see why I should.

Q. So that it is not true that Mr. LeVeque paid you \$175? A. He didn't give me 75 cents. All I got from the Southern Sword—I beg your pardon.

Q. Did you say or hear me say one word to the crew of the Isabel H? A. No.

*Fred G. Velez—For Government—Cross.*

Q. As chief mate you were in charge of the transfer of the cargo? A. I helped transfer the cargo.

Q. You were there all the time? A. All the time, from the start until the finish.

Q. Where did you go on the night of Friday, the 19th, I think it was, the day you were questioned and you came to Mr. Callahan's office, where did you go from there? A. One day, either the first or the second day, I went up to that gentleman's office (indicating Mr. Halle), and talked to Mr. LeVeque.

Q. That same night where did you go? A. I think it was the same day we were arrested, or the next day, and went to LeVeque's home and he was not there.

Q. You are not telling where you went. A. I am telling you.

Q. That same night. A. I went home.

Q. No, you didn't—didn't you go to the restaurant on the corner, in George's place? A. I don't know, I may have gone into the restaurant to get a cup of coffee.

Q. Who did you go with? A. I went into the restaurant, I went and had a cup of coffee. A day or two after I was arrested, I think Mr. Callahan—I don't remember what day it was—but I went into the restaurant a day or two after I was arrested with Mr. Callahan.

Q. You didn't go back to the ship, did you? A. No.

Q. The first time I was in the House of Detention; never, mind how long I was there, but when I came out did you see me? A. I didn't know how long you were out when I saw you. The first I saw you was on Beaver Street.

Q. The first time I was in the House of Detention in the spring of 1936 or somewhere in 1936. A. You are right, Captain, you and I were talking on 12th Street, I think.

Q. It was the Seaman's Institute, and you and I had a cup of coffee? A. That is right, but it was on Pearl Street.

*Fred G. Velez—For Government—Cross.*

682 Q. What did you say to me? A. I don't remember, but I probably said a lot. We had a lot to say in common.

Q. Didn't you say you got a dirty break? A. No, I didn't. Didn't I advise you to confess and take the rap?

Q. No, you didn't. A. Sure I did, I said, "The Government knows everything." I said, "Why don't you plead guilty and take the rap."

Q. Isn't it true that Mr. LeVeque had advised you to plead this way? A. I didn't say any other way I could take.

683 Q. Didn't you know Mr. LeVeque had several indictments against him? A. Sure, he told me, even before I was indicted, he told me he expected to be arrested, and also the gentlemen over there, Mr. Erickson and Nardone.

Q. There was an indictment over there in New Jersey, wasn't there? A. No, he didn't mention that.

Q. But there were several indictments out against him? A. There may have been.

Q. And did not LeVeque tell you if you helped him, that several of those indictments would be squashed? A. My dear man, I cannot help LeVeque. What I am testifying about LeVeque may hurt LeVeque. I cannot help LeVeque none. LeVeque went to jail before I testified.

684 Q. But you remember LeVeque telling you that I came to see LeVeque? A. He told me you came up there and he gave you two or three dollars. You said you were broke.

Q. How long have you been around South Street? A. I don't know, quite a while.

Q. Do you know Captain Daily? A. No.

Q. Do you know Mr. Truett? A. No.

Mr. Dunigan: I object unless it is shown they have some connection with the case.

Defendant Brown: The next question I would like to ask if I may—



*Fred G. Velez—For Government—Redirect.*

The Court: It is perfectly legal for you to ask it, but if you ask it, you are bound by his answer. 685

Defendant Brown: I don't want to be unfair.

The Court: It is perfectly fair in the trial.

Q. Have you ever been investigated on narcotic charges?

A. Never.

Q. You have never been investigated? A. Never been investigated on narcotic charges.

Q. Never been convicted of it? A. Never been convicted of it, never was involved on narcotic charges.

Defendant Brown: I will bring a witness here. 686

The Court: I told you if you asked, you were bound by his answers. I will not allow them to testify.

*Redirect examination by Mr. Dunigan:*

Q. You didn't testify as to the attempt to move LeVeque to New Jersey on that indictment? A. No, sir.

Q. At the last trial LeVeque had pleaded guilty to that indictment? A. I understood so.

Q. You knew he was not on trial? A. No, he was not on trial. 687

Q. You didn't make any definite arrangements with Callahan to bring in the liquor for LeVeque or Erickson, nothing definite was reached between you and Callahan?

A. No, nothing definite was reached between me and Callahan as to bringing in the cargo.

Q. The last time you had talked with Callahan about that was when LeVeque turned it down because he said he was scared, is that right? A. That is right.

Q. You were not the captain when you met the boat out at Winter Quarters, were you? A. No, sir.

*Fred G. Velez—For Government—Recross.*

688 Q. And in your experience does the third mate take orders from the captain of the boat? A. Yes.

Q. Did I understand you to say that you told Captain Brown that his best friend Stark had pleaded guilty? A. No, I told him that his best friend Stark had told the Government I must advise him to plead guilty.

Mr. Cahill: Advise who?

The Witness: I myself advise Captain Brown to plead guilty.

Mr. Cahill: I move to strike that out.

689 The Court: No, it was brought out by himself. He was instructed that the answer to the question would bind him.

Mr. Cahill: I think, in view of the fact that he hasn't a lawyer, it should be stricken.

The Court: No.

*By Mr. Halle:*

Q. You advised Captain Brown to plead guilty? A. Yes.

Q. Did you consider that you were guilty yourself? A. Personally, I think I was guilty.

690 Q. Did you arrange to plead guilty for yourself in this case?

Mr. Dunigan: That isn't necessary because I made a concession, and he was not indicted.

Q. Did you feel guilty about yourself?

Mr. Dunigan: I object to that.

The Court: Sustained.

(Adjourned to March 20, 1939, at 2:00 P. M.)

*Joseph A. Kozac—For Government—Direct.*

New York, March 20, 1939.

(Trial Resumed)

Defendant Brown: I have the probation report filed in the Federal House of Detention.

The Court: I require you to turn that over, that is Government property. You may consult Mr. Cahill whom I appoint to represent you if you wish.

Mr. Cahill: This is a probation report?

Defendant Brown: Yes, sir.

The Court: I understand it is a copy of a report intended to cover the man convicted. They did not know where he was going so it got up to the Federal House of Detention, is that so?

Defendant Brown: Yes, sir, it was given to me when I was released.

Mr. Cahill: Let me talk to him aside for a moment. I don't see any occasion for making any point about it.

The Court: Neither do I. If I thought there was any I wouldn't require him to give it up.

JOSEPH A. KOZAC, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

(Bottle marked Government's Exhibit 68 for Identification.)

I am a Special Investigator, Alcohol Tax Unit, Treasury Department. I have been with the Alcohol Tax Unit since 1935.

*Hugh Carr—For Government—Direct.*

694 I saw 68 for Identification before. I first saw it on Saturday morning of last week when I opened up 32 in evidence. One of the 3 gallon cans had several holes punched in it. I poured enough of the contents of that to fill it. I then took it to 641 Washington Street where I gave it to the chemist in charge in the presence of Mr. Hugh Carr and Mr. Riley, who initialed it in my presence.

HUGH CARR, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

695 *Direct examination by Mr. McKnight:*

I am a chemist in the Bureau of Internal Revenue. I have been so employed over eleven years.

I have seen Government's Exhibit 68 for Identification before. On Saturday morning it was turned over to me by Investigator Kozac. I found this to be alcohol 96.45, potable alcohol.

(Government's Exhibit 68 for Identification received in evidence.)

696 By potable alcohol I mean fit for consumption, and it was alcohol fit for use for beverage purposes, potable, is fit for consumption. I have testified this is 96 per cent by volume; pure alcohol is 100; that is, absolutely pure alcohol would be 100.

*Daniel Valley—For Government—Direct.*

DANIEL VALLEY, called as a witness on behalf of the Gov- 697  
ernment, being first duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

I am a seaman. I work on the Southern Sword. I was first employed to work on the Southern Sword at New London in 1936, January 15th. The Southern Sword was a coastwise vessel.

I know Austin Callahan. I signed on the Southern Sword before I knew him. I see Callahan present. That is Mr. Callahan (indicating), in the black suit. The second one from the other end. 698

On the Southern Sword the first time I came I was an able seaman. I make about four trips. The bosun quit and Mr. Brown made me.

I was on duty from eight to twelve in the morning and eight to twelve at night. When I signed on the Southern Sword Captain Pendleton was captain. Captain Brown was chief mate, chief officer then.

I know Captain Brown. I see him right here in the courtroom. The last trip that the Southern Sword made was from Boston to Newport News. From Newport News we came to New York. That was the last trip I made on the Southern Sword. We left Newport News on Monday morning, the 16th of May. From Newport News at nine o'clock in the morning I stayed on my duty, eight to twelve morning and eight to twelve at night, yes, eight to twelve at night. I relieved somebody at the wheel, eight o'clock, from eight to ten. 699

Captain Brown changed the course, turned around in circles, from east to south, southwest, north and then steady to east again. Then stopped the engines down and slowed the ship. At ten-thirty Captain Brown relieved me at the wheel and told me to go down and bring him coffee, then called everybody to stand by on deck. So I called every-



*Daniel Valley—For Government—Direct.*

700 body to stand by. Around eleven o'clock a small boat came in on the starboard side. Yes, a small boat. It came to the starboard side and the captain from the small boat asked for Captain Brown. I said "Where do you want to go, alongside?" That was the captain of the small boat who said that to Captain Brown. Captain Brown talked to the captain of the small boat and he said, "Come on the port bow." Captain Brown said to the captain of the small boat "How many hundred cases you got?" So he told Captain Brown 1800 cases.

By all hands to stand by I mean the whole crew. To go back a moment, on the trip down from Boston to Newport News Pendleton was captain. Pendleton was not on the boat when it left Newport News. Pendleton quit and Captain Brown took charge.

After he said he had 1800 cases a small boat came alongside to make fast. They made fast a line fore and aft. Sailors from the small boat took the cases and put them inside the big boat. I helped in that. The firemen helped. Everybody gave a hand to put those cases inside. The cases looked like Government's Exhibit 32 in evidence here, but there were two different sizes, one a foot and a half smaller, one looked like this one. Some of the cases were leaking, a smell all over the deck. It smelled like alcohol.

702. My pants got all wet with alcohol. I didn't see any name on the small boat. I was at the wheel when the boat was going east, south, west, north. Captain Brown ordered me to. He told me in which direction to go. He gave me each course in which to go.

Government's Exhibit 46 in evidence looks like the small boat that was alongside. It took from half past eleven until two o'clock to unload the cases from the small boat to the Southern Sword and everything clear. When this small boat tied up to the Southern Sword I saw a light-house off the port bow.

*Daniel Valley—For Government—Direct.*

After the unloading was finished the Southern Sword 703  
 came to New York. I didn't know where the other boat  
 was going. She took her course, but I didn't know where  
 she was going. We came to New York, to Staten Island  
 and Liberty, and Captain Brown slowed the ship. Then  
 I saw another small boat coming. That was down the  
 harbor. That was the next night after we had stopped out  
 at sea and loaded the cases. The Southern Sword slowed  
 down at nine-thirty at night. I saw that tugboat coming.  
 It came to No. 2 hatch. I stand a great deal at No. 2 hatch.  
 Then Mr. Callahan jumped from the small boat inside. He  
 saw the hull bosun. I say, "Hello, Mr. Callahan." Mr.  
 Callahan went to the bridge. Captain Brown was on the 704  
 bridge. Callahan remained on the boat five minutes and  
 he got back on the tugboat. I saw him; I stand there.  
 After Callahan got back on board, the tugboat went to the  
 Battery. I remember the letter M on the smokestack on  
 the tugboat.

We passed up the North River alongside Pier 72. I  
 had never gone up the North River before, that was the  
 first time. I used to go to the East River all the time.  
 When we came to Pier 72 I didn't see a light. It was dark.  
 No lights. No men on the dock. I see a tugboat around  
 Pier 72. We tied the ship to the pier. Longshoremen came.  
 Somebody opened the door and they came aboard. Then I 705  
 told the sailors to go down to the dock, take a light and  
 make her fast. I said that. We tied up the ship before I  
 saw the 20 longshoremen come aboard. They took up all  
 the cases and put them on the dock. All of the crew helped  
 in that. Some of the cans were still leaking. I didn't see  
 any trucks on the dock because I work inside. It took us  
 3 hours to unload the cases this time on to the pier. We  
 finished at half past two. The Southern Sword went to  
 Bridgeport, Connecticut. Captain Brown was still in  
 charge.

*Daniel Valley—For Government—Cross.*

706 When we got to Bridgeport Captain Brown was not on board any more. He went ashore.<sup>d</sup> I don't know where he was going. I saw Captain Pendleton at Bridgeport. He took charge from Bridgeport; we came back to New York.

When we came back to New York we dropped anchor off Staten Island, a Coast Guard came alongside and everybody stayed in jail. The weather that night when we unloaded was very clear weather; no rain, no wind, no snow.

*Cross-examination by Mr. Cahill:*

707 My native tongue, the language I speak, is Moro. I am a Filipino. I do not speak Spanish. -I speak to Velez my own language than English. Velez don't talk my language. I spoke to Velez in English.

*By Defendant Brown:*

708 I don't remember how many weeks Mr. Brown was captain while I was aboard. We left Newport News nine o'clock in the morning. I got to Winter Quarter Light Vessel at ten o'clock. I didn't see a mate on the bridge, only between you and I. You stand in the chart room, I stand on the wheel. Another sailor was my watch mate. I don't know the name.

I was on that ship three months, and I don't know my own watch mate. I had been watch mate with him for three months the same hours, and I don't know him. I was not watch mate with him the whole time, there was someone I don't know. I was on watch between eight and twelve. I stand by the wheel from eight to ten, and I say we came to Winter Quarters at ten o'clock, and we did not meet the other vessel after we passed Winter Quarters. We met that vessel at ten o'clock. I stand up at the wheel and see that lighthouse from the lookout at the vessel head. I stand up at the wheel as well as lookout from the vessel head.

*Tilden Iver Moe—For Government—Direct.*

I saw a lighthouse. You don't have to ask about this one. That is against the law, Mr. Brown. What am I going to get for that? I said I saw a lighthouse, and I testified I saw it on the port bow. I testified I was at the wheel. I did not hear anybody hailing the vessel. I saw you walking on the port wing of the bridge. I heard what you hollered, and somebody hollered to me, he said watch, we go alongside. You tell the small boat to come alongside on the port bow. 709

(Q. Did you hear any hollering before he said that?  
A. No response.)

It was nice weather, no wind, no weather when we entered New York. I didn't hear you playing the fog whistle. Mr. Brown, no fog, no rain, nothing. You pass very slowly in New York Bay and you slow up speed. I didn't read the weather report the next day. I did not see any vessel following you. I was on watch when we entered New York. It was not raining. The man that came aboard that I say was Mr. Callahan, he had brown topcoat and he had something around his neck. He didn't have an oilskin and sou'wester, he had a brown topcoat on. 710

TILDEN IVER MOE, called as a witness on behalf of the Government, being first duly sworn, testified as follows: 711

*Direct examination by Mr. McKnight:*

I am on service at the United States Naval Hospital. I have there a patient named Ira G. Stark.

*Daniel Sabio—For Government—Direct.*

712 DANIEL SABIO, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

I was a member of the crew of the Southern Sword in March, 1936. I first signed on the Southern Sword on November 15, at 10:35. I know Mr. Valley who was a member of the crew. I know Mr. Austin L. Callahan. I remember being at Newport News on the last trip up to New York.

713 The day we left Newport News was I think March 16th, at about half past eight in the morning. The captain on the boat from the last trip from Boston to Newport News was Captain Pendleton. Captain Brown was the captain of the boat when you left Newport News en route for New York. We stopped out at sea after you left Newport News. That was March 16, about ten o'clock at night. This time I was asleep and somebody called all hands on deck.

714 Then I put on my working clothes and go up on deck. When I got on deck after I had work loading cases, I saw another boat, the Isabel H. It was tied up to the Southern Sword. I helped with the cases. They looked like this one here, referring to Government's Exhibit 32 in evidence. Some of the cases were leaking. I smelled alcohol. I do know the smell of alcohol. I get my pants wet. Government's Exhibit 40 in evidence looks like the boat that came alongside.

After these cases were loaded on to the Southern Sword we did come on to New York. My watch was twelve to four. The bosun called us all hands alongside the dock. That was up the North River at pier 72. We came alongside the dock and after that unloaded the cargo. Then we went on to Bridgeport, after the ship was empty.

We left Bridgeport and came down to New York. That is where I was arrested by the Coast Guard.



*Daniel Sabio—For Government—Cross—Redirect—  
Recross.*

*Cross-examination by Mr. Nolan:*

I did not see Mr. Callahan at Newport News before you went on this voyage. I did not see him at Pier 72, North River. I didn't see any man that looked like him come on the boat at Governor's Island or the Statue of Liberty.

*Redirect examination by Mr. Dunigan:*

I did not see the tug that came alongside the Statue of Liberty. My watch was twelve to four, and I was asleep.

*By Mr. Nolan:*

When you got to Pier 72 it looked like rain and fog.

*By Defendant Brown:*

I was aboard from November 15. You made two trips. I don't know how many weeks—three. I came on watch at twelve o'clock on the morning of the 17th. I did not observe any lightvessel. I was on deck when we took those cases from one ship to another. I did not see you there, I never saw you. I saw the chief mate, Mr. Velez, he had charge of the transfer. I did not see him go on board the rum runner or whatever boat that was. I did not see you talk to anybody on board that boat. I did not hear you say anything.

I do not remember when we loaded some stuff there in Jersey City and took it to Norfolk. I do not know the man that came aboard with Velez, when the master shoed him out. I do not know that the shipping master wouldn't send any more men out unless Captain Pendleton stopped his crooked paying off.

*Conrad Mathiasen—For Government—Direct.*

718 *By the Court:*

The shipping master spoke to me. He did not speak to me about Captain Pendleton. He did not speak to the rest of the crew while I was among them of Captain Pendleton. I do not remember anything he ever said about Captain Pendleton at any port.

*By Defendant Brown:*

719 I got paid at Bridgeport. That is the only time. I did not receive money while I was on that ship at one time. I could draw only ten dollars. When I got that I had to wait some time to midnight to get my pay at Bridgeport. I never got paid off in the day time. I do not know when Mr. Velez came aboard and I do not know his partner. I do not know a man named Hasseni aboard that boat. He was not my countryman.

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CONRAD MATHIASEN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

720 (Mr. Cahill: Before this witness begins, on behalf of the defendant Nardone and the other defendants not mentioned in the testimony of the last two witnesses, I move that the testimony be stricken as immaterial and irrelevant and not connected with them in any way.)

The Court: Motion denied.

Mr. Cahill: Exception.

I am in the transportation business. Docking steamers, general towing. We own boats, a fleet of boats; they are

*Conrad Mathiasen—For Government—Direct.*

tugboats. We have mark or letter on those tugboats indicating ownership. That is white paint on the stacks with the blue M on it. I recall on or about March 17, 1936, receiving a telephone call at our place of business, Bowling Green 9-7780. That is not the only number that I have at my place of business, there are four numbers. We do not have one Bowling Green 9-7949 or something like that. The other numbers we have are Bowling Green 7780, 81, 82, 83, 84. The numbers that I have given you now are the same numbers that we had on March 17, 1936, as far as I know it is. My home telephone number is Shore Road 8-976—I forget my own number now. Shore Road 8-8517 is right.

I know the defendant Gottfried. I think I met him back in 1934 during that year. I saw him only on about two or three occasions. I might have seen him in 1935. I think I saw him in my office I believe once or twice, 1935. I don't think I saw him in 1936 and prior to March 17th of that year. I have a brother by the name of Ludwig Mathiasen associated with me now and was in March, 1936. I received this telephone call on March 17, 1936.

I believe at just about 5:30 P. M. I know the telephone operator was just locking up the board. I received a telephone call about putting a man on board the Southern Sword. I received a telephone call if I could have a tug available to put a man on board of a steamer at Red Hook Anchorage. Thereafter I did not have a conversation with my brother concerning putting a man on board the Southern Sword.

One of my tugboats used to put a man aboard the Southern Sword. My brother was the master of the tug. The dispatcher gave him orders. I had given the dispatcher his orders subsequent to the receipt of the telephone call. To my recollection I believe the tug left Pier 5 East River around nine o'clock in the evening. That was on the 17th, the same date that I received the first call; I am pretty sure of that.

*Conrad Mathiasen—For Government—Direct.*

724 I do not remember ever giving Gottfried my home telephone number. I received a subsequent telephone call on the 17th about putting the man on board, that she was bound for Bridgeport. I did not receive any other calls besides that one. On the 18th I received a telephone call from the same voice that had called before. I know the name of the boat that the tugboat was supposed to meet. They gave us the name Southern Sword. I had had dealings with the Southern Sword before. Subsequent to this first call on March 17th I did not talk to the Alco Steamship Company or any of its officials. I called to the office of the Alco Steamship Company on March 17 in connection with placing a man on this boat, the Southern Sword. I did not talk to anybody there.

725 I cannot say if I ever seen the defendant Robert Gottfried write and if I would recognize the signature if I saw it. I believe the writing on these two matters, this one here is my bookkeeper's, a bookkeeper in the office, this check here (indicating).

I recognize that one, that is my writing. I did not know the speaker on this call of March 17th. On the call of March 18th it was the same person. That piece of paper refreshes my recollection with respect to the identity of the speaker. I recognized the voice of the speaker on the second day, on the 18th, as the one on the 17th. I thought I recognized the voice on the 17th, but I wouldn't make sure of that.

726 I said that I had known Gottfried since 1934. I don't think prior to March 17, 1936, I conversed with him on the phone. I had no other dealings with them. I saw him from time to time after 1934, and up to March 17, 1936. I spoke to him. I do not know Austin Callahan. I wouldn't say I never met him, but not to my knowledge. I don't think I ever called the Alco Steamship Company prior to March 17, and I only called the Alco Steamship Company after this first call came in on March 17th.

*Conrad Mathiasen—For Government—Cross—Redirect—  
Recross.*

*Cross-examination by Mr. Halle:*

I had some business transactions with the defendant Callahan about the sale of a boat and commission. I was selling a vessel once with Mr. Hedger in 1934. I did not have any business dealings with him after that.

*Cross-examination by Mr. Nolan:*

I said I did not know the defendant Callahan to my knowledge. We took the Southern Sword in tow and took it to drydock for repair. We were paid for that in January, 1935. I couldn't tell if this is the check I received. These checks go to the bookkeeper and I don't even see those things. There is the company's stamp on the back of the check.

We had the orders from the drydock to pick up the ship. Very often we will be called up and someone will say take the ship from there and there. It is not necessary to go through the company's office.

*Redirect examination by Mr. Dunigan:*

This transaction we had with Mr. Gottfried in 1934. I cannot exactly remember this transaction, but I owned this particular vessel. It was one of the Atlantic Freight Company's ships that I owned. I was selling this vessel to the Hedger Company. That was the time I met Mr. Gottfried. There was some controversy there.

*Recross-examination by Mr. Halle:*

It had nothing to do with the situation that I heard mentioned in this case or with any of the people involved in this case. That was in 1934.



*Ludwig Mathiasen—For Government—Direct.*

730 LUDWIG MATHIASEN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

That was my brother that just testified preceding me, and I am engaged with the Mathiasen Shipping Company, in the same business with him. I heard him testify that on March 17th, 1936, he sent orders to the dispatcher through me. I received these orders. I gave orders to send a ship to meet the Southern Sword at Red Hook.

731 When I received these orders I went and got the tug and went to Pier 5. Nine o'clock at night I had orders. I saw a man. He came over the bow of the boat. He stayed in the kitchen. He never came up in the pilot house. He did not have conversation with me. I went along sailing and got alongside the Southern Sword at ten o'clock that night.

The man did not have any conversation with me. I had my orders and went on board the ship. He went on board the ship, and stayed two or three or three or four minutes. I saw this man come aboard the tug. I saw him go aboard the Southern Sword, and I also saw him come back.

732 I think the man had a raincoat on. I am not sure. I didn't pay much attention to how he was dressed. The kind of night it was anybody would have a raincoat on. After he came on board the tug I brought him back to the pier, and he went ashore. After that I went to Pier 9 North River.

The Southern Sword passed me going up the North River, that is the last time I saw her.

*Ludwig Mathiasen—For Government—Cross.*

*Martin M. Micken—For Government—Direct.*

733

*Cross-examination by Mr. Nolan:*

It was a rainy night. The wind was easterly, heavy rain. I don't know exactly what force the wind had; I should say it was blowing about 35-40 parts an hour. There was fog with that rain. I don't know Mr. Callahan.

*By the Court:*

With a 35 mile wind there was no fog, but with a heavy rainfall like it was that night it would be thick weather. I mean heavy rain with a mist which you would call thick weather.

734

MARTIN M. MICKEN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct-examination by Mr. Dunigan:*

I am an investigator in the Alcohol Tax Unit. I have been an investigator for ten years. I was an investigator on or about November 22nd, 1935, stationed at Newark, New Jersey.

735

On the night of November 22nd, 1935 I was assigned to shore patrol along the New Jersey coast. My duties on that particular date took me around the vicinity of Keansburg, New Jersey. I was accompanied by Investigators Shellenberger and Wade. We made a check at the dock at Keansburg about eleven o'clock on the night of November 22nd, 1935, and we checked other points along down the line and came back to Keansburg around three-thirty in the morning.

*Martin M. Micken—For Government—Direct.*

736

After we got back to Keansburg we pulled up on to the dock to a gate we had stretched across this dock and parked our car there. Investigator Shellenberger and I got out of the car and left Investigator Wade, who was just a new man, to watch our car. This gate was about 8 foot high, with two strands of barbed wire at the top of it. We climbed over the top of this fence and started walking out on this pier. The pier is a steamship company's pier and it is approximately a half a mile long. It extends out into Raritan Bay. We had just walked a short distance.

737

Mr. Cahill: We object and move that it be stricken out on the grounds that it is not connected with any defendants on trial and is immaterial and irrelevant.

The Court: Overruled.

Mr. Cahill: Exception.

738

We started to walk out on this pier. Due to the heavy sea, they had had quite a severe storm, and the storm was just dying down and leaving and it was necessary for us to light a flashlight due to the boards loosening up, due to the waves running under this dock. We found a quantity of alcohol piled up on the left side of this dock. It was piled up in cases. Some of the cases were busted and the cases were lying loose. The cans were 3-gallon cans and each case contained two 3-gallon cans. These cases looked like this case here, Government's Exhibit 32. I did not see any boat. There was no boat out there.

In addition to this 750 gallons of alcohol piled up there, we turned back to get our car and Mr. Wade and Shellenberger had the flashlight. We came out and walked over to our car but nobody was in our sight. We then started walking from the car to the land end, which was approximately 150 to 200 feet away from the car. We had just walked probably 10 feet from the car when over on our

*Martin M. Micken—For Government—Direct.*

right in a little building there somebody commenced shoot- 739  
ing. Shellenberger and I returned the fire. After about  
15 or 20 shots had been fired we yelled over that we were  
federal officers and asked what the idea was in shooting.  
This man stated that he was a watchman and that there had  
been some robberies there and that was his reason for shoot-  
ing. We told him to step out and we would identify our-  
selves. We then got together with this man whom I later  
found out, whose name was Jack Saunders, quite a tall  
man, about six foot and weighed about 210 pounds, red  
sandy hair. We asked him to put his gun away and  
he said he wouldn't put his gun away unless we put our  
guns away. We asked him where the other man was and 740  
he said he saw him walk towards the end of the pier. In-  
vestigator Wade. We then told him we would put our  
guns away if he would put his gun away. I put my gun  
away and he put his gun away also. I kept asking him  
about the investigator, Investigator Wade, and he said he  
would go along and show us where Investigator Wade went  
to. I was alongside of him talking to him. Investigator  
Shellenberger was about 10 feet in front of him. We had  
just walked a short distance when he pulled out his gun  
and yelled to stick them up to Shellenberger and I. Shellen-  
berger immediately ran to the end of the dock and dis-  
appeared.

I stayed with him there and asked him about Investi- 741  
gator Wade and where Investigator Wade was and he  
finally agreed to bring Investigator Wade over. He finally  
brought another man over and this other man was advised  
by Saunders to search me and take my gun away from me,  
which he did. Saunders then left and I heard some con-  
versation with the third man and immediately after that  
Wade was brought over to where I was. And while Saunders  
was talking to this third party the second party had my  
gun.

*Martin M. Micken—For Government—Direct.*

742 Investigator Wade came back with Saunders. Saunders told me that they had this alcohol out there and wanted to make some money for Christmas and regardless of what happened they were going to get this alcohol off. I told him that the man that had escaped would no doubt make a phone call for assistance and in addition to that we had a car that would check back on the other car, that is, one car would go along and another car would check an hour or so after that. Saunders then left and returned in about five minutes and got into the government car with this other man and drove off. We later found the car parked about a block or two from this pier.

743 After that Wade and I got into our car and found Investigator Shellenberger and then went up to the police station and the sergeant at the desk there said that he had received a call to come down to the dock but that he had been unable to get in touch with the captain as yet. The three of us then returned to the dock and went out to the end of the dock where this alcohol was piled up and made a search out there and we later found four men that were underneath the dock hiding, a man by the name of Johannis, Wise, Baker and Murray. All these four men stated they had been hired to unload a boat.

744 Mr. Climenko: I object to that.

The Court: Sustained.

Mr. Cahill: We are going to make a further motion but we will allow this to be completed as to lay the full basis for the motion.

I have seen Saunders since that time. Investigator Shellenberger and Wade and I on March 1st came to the Detention House in New York. Investigators Shellenberger and Wade and I identified Jack Saunders. Investigator Wade in my presence identified Pierre LeVeque as one of



*William E. Dunn, Jr.—For Government—Direct.*

the other men. This third person, the one who came up with Saunders and held my gun, to date we have not been able to find him. 745

This photograph, Government's Exhibit 2 in evidence, is a picture of Jack Saunders. I asked Mr. Wade for a description of the man that had kept him in this little building. This man had a gun and made the investigator lie down.

Mr. Cahill: We now feel bound to move for a mistrial upon the ground that this evidence presents these defendants before the jury in a character which is wholly unjustified and places upon them responsibility for the acts of unknown persons in several instances and acts of two who are unidentified and who are not shown to have been connected with any of the defendants on trial. Certainly as to these defendants they would be tried on any substantive offenses and it is no more binding against them and just as prejudicial as if they were on trial for only substantive offenses alleged to have occurred at that pier that night. 746

The Court: Motion denied.

Mr. Cahill: Exception. 747

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WILLIAM E. DUNN, JR., called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

I am a Special Investigator, Alcohol Tax Unit. I have been so employed since 1925.

I first went to the Hotel Astor on December 16 with Special Investigator Swan. At the Hotel Astor I saw

*William E. Dunn, Jr.—For Government—Direct.*

748 Pierre LeVeque, with him at the time was Burt Erickson. It was in the middle of the afternoon. I went there accompanied by, in addition to Special Investigator Swan, by Mr. Rens and Mr. Nolan, of the Alcohol Institute. LeVeque was at the rear of the 44th Street corridor. There was a group of telephone booths, eight or ten in number, and a telephone operator and I saw them there for quite some time.

I did not see them using the pay stations. I just saw them standing and talking together. After some time I saw Burt Erickson come up the corridor towards the front of the hotel and talk to the clerk at the Western Union desk. 749 I saw him pick up a telegraph blank and walk back to the rear of the corridor, back by the telephone booths. He remained there some time and then returned to the Western Union desk again and shortly after Pierre LeVeque came over there with him and sat there. Erickson was in conversation with the clerk and I saw him make some motion as if he was counting out money.

After that they then left and went back to the rear of the 44th Street corridor again, near the telephone booths. I continued to observe them. I don't know anything further except they stayed there and were talking. Some time after that I saw George Geiger, at the same time, shortly after. 750 The three of them, Erickson, LeVeque and Geiger, then walked towards the front of the hotel and went down to the grill room. They sat there at a table for probably a couple of hours in conversation. I didn't see them in company with anyone else. After that the three of them came out and went out the front entrance of the hotel. I did not see them again that day. On the following day I went there accompanied by a representative of the Western Union Telegraph Company to interview the clerk at the Astor Hotel. I was shown some Western Union telegrams at that time. Government's Exhibits 13 and 14 in evidence were two of the Western Union money orders shown to me at that time.

*William E. Dunn, Jr.—For Government—Cross.*

Q. I ask you the same question with respect to Government's Exhibit 12 in evidence? A. Yes, sir. 751

Likewise, Government's Exhibit 13 in evidence, a telegram. I went to the Astor Hotel again on December 19th. I saw LeVeque and Erickson and Geiger and Nathan Hoffman. Nathan Hoffman is in court. He is the third man on the first bench there, the one in the middle of the five sitting here against the rail. I saw them at the rear of the 44th Street corridor down by the telephone booths, all together. They were in conversation, in a group. I did not see them on that occasion using the pay station. As I recall, I observed them for about an hour.

I saw Burt Erickson and Pierre LeVeque go to the Western Union desk shortly after they were joined by Geiger and Hoffman who stood alongside of the desk. There Erickson engaged the clerk in conversation. I couldn't see exactly what they were doing. They remained there for just a short space of time. I subsequently went up and spoke to the young lady operator, I think Miss Edelman. The four, Erickson, LeVeque, Geiger and Hoffman, returned to the 44th Street corridor again and shortly after that they all left the hotel. I didn't see them again. 752

*Cross-examination by Mr. Cahill:*

Mr. W. N. Woodruff instructed me to go to work on this case, I think, on the afternoon of December 16, as far as I can remember. I don't think on that date I spoke to Mr. W. E. Dunigan about the matter; I think possibly on the 19th I did. 753

*Cross-examination by Mr. Climenko:*

I said that on December 19th I saw Nathan Hoffman at the Hotel Astor. Burt Erickson, Pierre LeVeque, George Geiger and Nathan Hoffman were present. Only those four

Wm. E. Dunn; Jr.—For Government—Redirect—Recross.

754 persons. I testified in the first trial of this case. In all, about the month of December, 1935, I saw the defendant Nathan Hoffman only on that occasion. I learned his identity some time in March of 1938. I saw this man prior to March, 1938, only once in my life, and that one occasion was December 19, 1935. Two and a half years later I learned his identity. I did testify in the first trial of this case and I was then asked as to the identity of a person and I didn't know any such person as Nathan Hoffman. That was in December, 1936 and now in 1939, March, 1939, I am able to identify that person as Nathan Hoffman, although some time in 1936 I was not able to do so.

755

*Redirect examination by Mr. Dunigan:*

I had not seen Nathan Hoffman from March, 1935, to December, 1938 but I had seen a photograph of him. I do not know whether he was on trial in 1936.

*Recross-examination by Mr. Climenko:*

756

I saw the photograph sometime shortly after March of 1938. Before I testified in the first trial no photograph was shown to me. I was prepared for my testimony in the first trial but I don't think there was any rehearsal, I went over it. Nobody at that time showed me a photograph of Nathan Hoffman and I did not at any time see a photograph of Nathan Hoffman prior to March of 1938. I saw this man once. I think it was Mrs. Kozak who showed me this photograph in our bureau office. Mr. Kozak is an associate of mine and he and I work together in the same department. I don't recall whether I knew he was going to show me this photograph before he exhibited such a photograph to me. I can remember the time the photograph was exhibited to me, it was sometime around the

*William E. Dunn, Jr.—For Government—Recross.*

middle of the month; I don't know the exact date. I don't think, before I actually saw the photograph, I knew that Mr. Kozak was going to show it to me. When I was shown this photograph I was shown only one. 757

I had a conversation with Mr. Kozak that morning and Mr. Kozak said, here is a photograph. He wanted to know if that was one of the men I had seen at the Astor Hotel. Quite some time elapsed prior to the date when I was shown this photograph, since I had discussed that case with him, perhaps a matter of months; then all of a sudden, after a lapse of months, Kozak approached me and showed me that photograph and asked me a question. I had no difficulty in identifying the photograph. 758

At the first trial I was asked: "Q. I show you Government's Exhibit for Identification and ask you if that is a photograph of Geiger?" my answer was "Yes, sir."

And then a question was asked, "Who was the other man in the crowd at the time, Mr. Dunn; do you know?" and Mr. Dunigan withdrew that question and then I was asked by Mr. Dunigan: "Q. Can you tell us who the other man was that you saw at that particular occasion?" and my answer was "To my own knowledge, I cannot identify him." At that time I didn't know him. I have since found out that I knew him. I mean I didn't know his name. I think I have seen his photograph since that occasion. 759

(Adjourned to Tuesday, March 21, 1939, at 11:45 o'clock A. M.)



*John L. Heins—For Government—Direct.*

New York, March 21, 1939.

**TRIAL RESUMED.**

Mr. Dunigan: May the record indicate and it is stipulated and agreed by and between counsel for the Government and counsel for the defendants and it is conceded that Michael Wynn would testify if called, that on March 17, 1936, he was a watchman assigned to duty in the vicinity of Pier 72, North River, and for a given reason, on which the jury is not to speculate, he was unable to see what happened at the pier there about nine o'clock at night, on March 17th, to about four A. M. on March 18th.

JOHN L. HEINS, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

I am a Special Investigator, Alcohol Tax Unit and was such on or about February 17, 1937. I know the defendant Hugh Brown. I saw him on or about February 17, 1937 in the Federal House of Detention on West Street, at about 2:20 P. M. I went with Chief Warrant Officer John M. Gray of the United States Coast Guard. I had a conversation with Brown, in the presence of Gray, on that day; nobody else present. I recall the conversation that I had with Brown.

Mr. Cahill: If the Court please, in behalf of the other defendants, I object to that.

*John L. Heins—For Government—Cross.*

Mr. Dunigan: I concede it is only good as 76  
against Brown.

The Court: I will give you (Mr. Cahill), the  
right to examine him before cross-examination.

*By Mr. Cahill:*

I identified myself to Captain Brown and showed my  
credentials. He knew I was connected with the Govern-  
ment because I had previously called on him subsequent to  
his arrest. He was a prisoner with nobody representing  
him. Mr. Gray, Chief Warrant Officer of the United States  
Coast Guard was with me when I approached him. I told 76  
Mr. Brown I understood he wanted to talk to some Govern-  
ment official. At the time I was not sent up there to take  
a statement, and Mr. Brown started to talk about his  
license which was due to expire or had expired and he was  
interested in its renewal, and I advised him at that time  
I did not have any authority to promise anything, that I  
did not have any authority to do it, and that we were  
there to listen to his story. That was most of what I said,  
because Mr. Brown was interested in his license.

We discussed this case. He gave us the story so far  
as he was concerned on everything that happened. I asked  
him questions and he answered most of them. We let him 76  
go ahead and he talked, he did most of the talking. My  
superior officer, Mr. Dunigan, sent me up there as the  
result of some communication that the District Attorney  
received. That was my understanding. I didn't see that  
communication and I didn't have a personal interest in  
the case at the time. There is not in existence, so far as  
I know, any written request for Captain Brown to make  
a statement. All I know is I went there as the result of  
an order from Mr. William Dunigan, my superior. I am  
positive I said I came as the result of a letter he had  
written to Judge Moscowitz. I did not see the letter and I

*John L. Heins—For Government—Redirect.*

766 don't know the contents of that letter. I don't think I gave him any warning as to his right to remain silent and not to give me a statement. My understanding—I don't think I did.

Mr. Cahill: On Captain Brown's behalf, I object to the competency as well as the irrelevancy and the immateriality of the testimony. Exception for Mr. Brown.

*By Mr. Dunigan:*

767 I had not taken any active part in the investigation in this case. I was at the Belford Restaurant on March 20th, but I had not taken part in the investigation. My conversation with the captain was that he started off saying he was the captain of the Southern Sword, and that he received his original instructions to meet the Isabel H. from Callahan at Newport News, that he received the instructions, who came aboard the ship there, from a Mathiasen tug; also that the former master of the ship, Captain Pendleton, was fully aware of what was going on, and advised Brown not to do it. That the first mate Stark, also advised Brown not to do it. I believe he was the first mate. I recall that Brown stated that he did come in and after receiving instructions to go to Pier 72, North River, that he did go up there and tied the boat up there, and after discharging the cargo he went to Bridgeport with the ship.

768

In the statement he testified he came alongside of the British boat off Winter Quarter Light. I have told all that I have concerning this matter and exhausted my recollection. I recognize this piece of paper and it refreshes my recollection with respect to any further conversation I might have had with him concerning this matter and, the only further thing is, Brown left Bridgeport, came down

*John L. Heins—For Government—Recross.*

to Callahan's office, never collected a cent of wages from Callahan, that Velez was on board his ship as an officer, that Velez came on board his ship after they went alongside the lightship. 769

I recall Mr. Brown making the first sentence in this paragraph. I had a conversation with Brown on this boat as to whether Captain Pendleton came up on this last trip. Brown said that Captain Pendleton did not come up on the Southern Sword on this last trip. This paragraph here beginning with the word "I" and ending with "Sword" refreshes my recollection with respect to some further conversation with Brown only insofar as the searchlight is concerned. I believe I have testified to the effect that the instructions were given by Mr. Callahan and that Mr. Brown was in command of the Southern Sword. Callahan told Brown the signal would be a searchlight played on the after deck of the Southern Sword. 770

*By Defendant Brown:*

That is not the only time you came to see me, it was a year later with Commander Yandell of the Coast Guard. I did not notice anybody standing around the door when I was questioning you, but there could be, I didn't see. A host of events occurred. The door was open on that second visit, and the man could hear every word that was spoken. 771

I believe when you started the investigation the Coast Guard Commander asked who was in with you belonging to the Coast Guard. I think you said, "Nobody". On the second visit you said, "Have you any reason to mistrust your own mind." I believe Captain Yandell on the second trip over a year over the time we originally came up to take your statement started to talk about Mr. Rasmussen then, who was in the Coast Guard stationed at Cape May at one time.

*John L. Heins—For Government—Recross.*

772. Mr. Gray was not present at the second time. Commander Yandell was. I don't recall anything that Mr. Gray said the first time. I believe it was the second time we came up and I believe we came up there for that purpose, to see whom you knew. To the best of my recollection, Commander Yandell was with me on the second trip.

All these words were said in my presence and in the presence of Mr. J. M. Gray. I do not remember saying I would put the brush on you, nor did I say I could keep you there for five years. I didn't say anything about keeping you there as long as I wanted to, as long as you wouldn't play ball. The second visit was over a year later. The first time I came to see you was in February, 1937. You did say you could retain your license.

If you asked me what Judge Moskowitz was going to do I believe I answered that I couldn't tell you. I have no recollection of whether you were supposed to be in court or not on the second visit, I might have had to wait for you quite a while, you might have been just taking off your street clothes. I made absolutely no promises, I had no authority to do so. I did not make a promise, I was unable to make any promises.

774. Q. Didn't Commander Yandell say, "Never mind, we will come back here next Friday and see if you change your mind"? A. I believe in all our relations up there we were friendly.

Q. I don't know whether you and me were friendly, but Commander Yandell and me were; do you mean to say that you didn't crumple up these papers? A. I don't think I had papers with me.

Q. And didn't you say, "I told you there was no use talking with this man"? A. I didn't visit you with any such idea in mind so I would say, "There is no use talking to you."

Q. Didn't I say what jurisdiction—didn't I say, "Do you come under the Attorney General," and didn't I say, "The



*John L. Heins—For Government—Redirect.*

steamboat inspectors come under the Secretary of Commerce," and didn't I ask what authority you had; "Are the people under the Secretary of Commerce," and didn't you say, "I know a steamboat inspector who can fix it up," and didn't you name the city? A. No, sir, Commander Yandell knew all the statements but we didn't go into words with him. This statement was taken on the first visit. I don't remember any words or promises. In fact, I don't remember much about the second visit. 775

Q. Do you recollect guards standing around the door?

A. I don't think I could identify any one of them.

Q. Would you identify them if you saw them? A. I don't think I could. 776

Q. You recollect the door was open on both occasions?

A. Yes, the door was open. I do not think the room where we talked with you on both occasions was one that could be closed.

Q. Do you recall you and one man sealed that door—they took you in through the steel door first, and did you hear him talk to me? A. No, I didn't hear any conversation.

Q. Did you see him talk to me? A. I don't recall.

Q. Just let me add and didn't say a word? A. I know the guard came and took you, because that is the usual procedure and then let us out on some such procedure as that. 777

*By Mr. Dunigan:*

I made notes the first time we were talking. It was in the presence of Gray and Brown. I have the notes with me now. I offer them in evidence. I dictated a statement from notes and from memory. After I left the House of Detention I came back to Mr. Dunigan's office and dictated it to Miss Beggs.

Mr. Dunigan: I offer them in evidence.

(Examination of Witness Heins suspended.)

*John M. Gray—For Government—Direct.*

778 JOHN M. GRAY, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

I am Chief Officer, attached to the Coast Guard Intelligence Unit in New York, having been in the Coast Guard Service for 24 years. I know Mr. Heins, the witness who preceded me on the stand. I heard him testify after a visit to the Federal House of Detention on February 17, 1937. I accompanied Heins on that date. When we went up there we seen the guards, of course. We saw Captain Brown, both Mr. Heins and myself talked with him, and Mr. Heins took the notes at that very time.

779

Captain Brown mentioned that he was master of the Southern Sword and had on a previous trip been to Eastport, Maine. If I can recollect, it was the trip before he was at Norfolk. That a man named Velez was taken on that ship as a mate; that he was put on there by the owner; on that particular trip they went to Norfolk.

Captain Brown saw him at the time the ship was in Norfolk and that Captain Pendleton left the vessel there and he took her over as master, and Mr. Velez was the mate; during that time before leaving Norfolk, he received instructions to meet the Isabel H off Winter Quarter Lightship and the signal at the time, the time they were to meet this vessel was a searchlight on the stern, that they met the vessel and at the time they met the vessel Velez, his mate, went aboard this vessel which had alcohol on it, and that after leaving the position the ship proceeded to New York, passed through the Narrows, and was met by a tugboat off of Robbins Reef. From there he went up to Pier 72, North River, and docked his vessel there without assistance. I did not hear Heins make any promises of any kind to Captain Brown. I did not

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*John M. Gray—For Government—Cross.*

hear him say anything about a nolle prosequi of the indictment. I do not know what a nolle prosequi is, I have never drawn one.

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(Recess to 2:10 P. M.)

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AFTERNOON SESSION.

(Government's Exhibit 69 stricken out.)

JOHN M. GRAY, resumed the stand.

782

*Cross-examination by Defendant Brown:*

The first time I saw you was the day you were arrested. The second time I saw you was February 17, 1937. I knew someone by the name of Captain Rasmussen. I didn't know of any Captain Rasmussen. I knew a man in the Coast Guard by the name of Rasmussen, years ago. The only Rasmussen I knew of at that time, he was in Philadelphia. I don't recall saying to you that I knew a Captain Rasmussen in the Coast Guard Station in Cape May. I do not recollect having a conversation about Captain Rasmussen.

783

When Mr. Heins and I left the room where we were speaking to you I saw a guard. I did not hear him say, "Brown, don't let them Buffalo you". I cannot recall where I was at the time when he let me out of the door. I know a guard came up to you and we were through talking. No, I didn't hear him say a thing.

*John L. Heins—For Government—Redirect—Recross.*

*William E. Dunigan—For Government—Direct.*

784

JOHN L. HEINS, recalled as a witness on behalf of the Government, having been previously sworn, testified further as follows:

*Direct examination by Mr. Dunigan:*

I did not have any conversation with Mr. L. Dunigan with respect to going to the Detention House to see Mr. Brown. I had a conversation with Mr. W. E. Dunigan, this gentleman here. I had no conversation with you concerning nolle prosequi of the indictment.

785

*By Defendant Brown:*

You made that statement on February 17, 1937. And we came back a year afterwards to see you. We came back to talk to you the first time.

(Witness excused.)

WILLIAM E. DUNIGAN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

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*Direct examination by Mr. Lester Dunigan:*

I am an employee of the Treasury Department. The Assistant Supervisor, Alcohol Tax Unit, Treasury Department, in the State of New York, I have been in the service continually since December 7, 1920.

About February 17, 1937 I had a conversation with Mr. Dunigan concerning Captain Brown, thereafter I had a conversation with Mr. Heins.

I had a second conversation with Mr. Heins.

(Witness excused.)

*William J. Geary—For Government—Direct.*

*George A. O'Shea—For Government—Direct.*

WILLIAM J. GEARY, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

I am Inspector of Customs, having been so employed about 30 years.

On March 21, 1936, I was assigned to search the Southern Sword. I went aboard the Southern Sword about two o'clock in the afternoon, and made a search.

(Witness excused.)

GEORGE A. O'SHEA, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

*Direct examination by Mr. McKnight:*

I am Clerk in the Marine Division of the Custom House. I will say I am in charge there of the records in connection with the entry of vessels into the Harbor of New York, but I am an assistant of anyone clearing vessels at the Custom House. There are more than myself doing that work, if a coast wise vessel were to meet a foreign vessel and take on cargo at sea such a vessel is required to make an entry in New York Harbor.

The Court: I will allow him to answer the question but will not allow him to answer anything about entries. The question the jury will have to decide is whether or not a meeting occurred, and the fact that the vessel did or did not I would exclude.

(Witness excused.)



*John J. McHugh—For Government—Direct.*

790 JOHN J. McHUGH, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

*Direct examination by Mr. Dunigan:*

I am Chief Clerk of the Liquidating Division, United States Customs. I am familiar with the duties on importation of alcohol, the duty on the importation of foreign alcohol into the Port of New York is \$5 a proof gallon. When I say "a proof gallon" I mean for any beverage over 100 proof we add one per cent for each proof above the 100.  
791 You can add one gallon to the number of wine gallons or one per cent to the \$5 per gallon. When I say "wine gallons" I mean any container holding a gallon of the liquid. And the proof is determined by the alcoholic contents by volume. So if the alcohol contains 90 per cent by volume I would double the percentage of the alcohol to determine the proof. It would make 90 per cent alcohol—180 proof.

So that a gallon container testing 90 per cent by volume would be 1 8/10 proof gallon, and it is on the proof gallons that the tax is imposed, if there would be imposed upon alcohol imported into the United States from a foreign country.

792 In addition to the regular customs duties an internal revenue tax of \$2 per proof gallon. That would have to be paid upon importation into this country of foreign alcohol.

This morning in Mr. Dunigan's office I made certain computations which I set forth on that piece of paper, the number of gallons upon the paper is 33,600 wine gallons I got it based on testimony that 800 cases came in at South Carolina; that 1500 cases came into New York, and on the testimony of the witness Lancaster that four loads were unloaded at Keansburg, New Jersey, each one of 800 cases. If the alcohol tested 192 proof that would multiply 33,000

*John J. McHugh—For Government—Direct.*

of 1.92 and that would give you 64,512 proof gallons. And using the customs tax and the internal revenue tax that would figure \$322,560 customs tax and \$129,024 revenue tax, a total of \$451,584. 793

(No cross-examination.)

(Witness excused.)

\_\_\_\_\_  
New York, March 21st, 1939.

Mr. Dunigan: I think with that the Government will close its case. 794

Mr. Cahill: Before we make our motions, if the Court please, I presume an inquiry would be in order.

The Court: Are you ready?

Mr. Cahill: We are ready.

The Court: How long will it take?

Mr. Cahill: Probably the rest of the afternoon.

The Court: The jury will wait outside.

(The jury retired.)

Mr. Dunigan: Before testimony is taken on the motion I would like to be heard on the question of law in connection with it. 795

The Court: What is it?

Mr. Dunigan: This motion is based upon the proposition that since it is alleged wire tapping has been outlawed by virtue of the Supreme Court's decision, that any clues and leads based on that is likewise outlawed. If that is true—

Mr. Cahill: It goes further: And the fruits of the wire tapping.

Mr. Dunigan: If that is the motion, then it is in the nature of a motion to suppress and at this time comes too late. I base my argument upon *Sigurelo v. U. S.*, 275 U. S. at page 106.

*Joseph A. Kozac—For Defendants—Direct.*

The Court: I will overrule that motion. I do not see how it could be made at any other time.

Mr. Dunigan: It was made and was denied by you as I recall it.

The Court: I indicated that I was in a very doubtful position to rule on a question of law that involved a matter of fact and could not be ruled on until your testimony was all in. I say it could not properly have been raised until your testimony was all in.

Mr. Cahill: No defendant's attorney could move until they knew what the testimony would be.

Mr. Dunigan: They are not surprised at all; they surely knew.

The Court: You have the same witnesses, but there is no reason why I would be expected to know what the witnesses were going to testify to. I will overrule that objection.

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JOSEPH A. KOZAC, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

*Direct examination by Mr. Cahill:*

I am connected with the Alcohol Tax Unit of the Treasury Department as special investigator. I have worked on the investigation in this case for the Alcohol Tax Unit. I worked on the South Carolina angle, and I also worked on—that is a rather difficult question to answer just in that way. I did work on the South Carolina case. I will put it that way. I worked on the whole case. I intercepted some messages by wire in connection with the investigation of this case. I worked on that phase of the case from about December 22, 1935, to about the middle of March, 1936. I believe I testified in a removal proceeding before the United

*Joseph A. Kozac—For Defendants—Direct.*

States Commissioner that beginning December 22, 1935, I made 650 interceptions, and if I so testified then, that is the fact. 799

The actual tapping I did not do. I intercepted conversations. I listened in while somebody else did the tapping. I don't know if it was somebody connected with the Alcohol Tax Unit; I presume so. Before I went on this mission I had been instructed to get on that particular instrument by Mr. William E. Dunigan. He is the assistant supervisor of the Alcohol Tax Unit at New York.

Mr. Dunigan: I object. The statute isn't aimed at the question of intercepting, it is aimed at the divulging of any message. 800

The Court: What difference does it make?

Mr. Cahill: I wish to show that the evidence given here came to them in part through the interception of these messages and that they didn't even know anything about the identity of the defendants or other persons connected with them or relations between them until these interceptions occurred.

Mr. Dunigan: There is a way of showing that.

Mr. Cahill: That is—

The Court: I will sustain the objection.

Mr. Cahill: Exception. 801

I listened to the conversations of Pierre LeVeque, of Frank Nardone, of Robert Gottfried, George Geiger, William Kleb, I believe, and a host of others. I listened to Nardone sending and receiving communications.

Q. From his house or place of business or where?

Mr. Dunigan: We object to that as being immaterial as to where they were sent from or where they were received.

*Joseph A. Kozac—For Defendants—Direct.*

The Court: That brings up another question, that I do not see how it can be solved in this case because it brings in intrastate messages.

Mr. Cahill: If the Court please, there is a certain decision in the Third Circuit, reported in the advance sheets. It may or may not be controlling.

The Court: I am not going to decide the law at this time.

Mr. Halle: May I say that in the Bonanzi case in this Circuit the Court held it was for the Government to show whether the message was intrastate and that is why they reversed the Bonanzi case because the Government did not show it was intrastate and that they would not pass on the question until it was squarely presented.

The Court: That may be but that has not been done here.

Mr. Dunigan: But in the Bonanzi case there is no evidence that the conversations were inter or intra and there are none in this case.

Mr. Cahill: Our contention is—

The Court: I do not see the materiality of this. I think the only way this can be heard is first of all you have to show that some of the evidence was procured from no other source.

Mr. Cahill: I think if we show that in every prior investigation of this case and the trial of this case they proceeded on the basis there were numerous interceptions and that they knew nothing about their relations until they had done so that that meets any burden cast upon us.

The Court: I will sustain the objection.

Mr. Cahill: Exception.



*Joseph A. Kozac—For Defendants—Direct.*

I did not know Nardone prior to the interception of these messages, nor Geiger nor Gottfried or Hoffman or Callahan. I first heard the names of some of them in these intercepted messages. I gave testimony before the first grand jury in South Carolina regarding these voices, and not as persons whom I knew. 805

At the time of the interceptions we didn't know what their dealings dealt with specifically. I do not recall I ever heard the word alcohol mentioned. I heard the names of several boats discussed. I never heard the name Isabelle H, I don't believe. I may have heard the name Pronto after it had been seized.

It is difficult to say that in those intercepted messages I heard some conversations between these persons relating to the importation of goods into the country. I heard them discussing plans for boats; that is, some of them. I heard them calling each other, discussing money matters. I did not hear them mention the word alcohol. Whether they mentioned specifically bringing in goods or other things I cannot say. These messages are, I believe, in the custody of the United States Attorney at the present time. I made some investigations in that case based upon information obtained in that fashion, and I used the information obtained in these interceptions in that way. I presume other members of the Unit used that information also in their investigations. 806 807

There were others working with me in the investigation of this case. They were Mr. William E. Dunigan, Mr. John Heins, Mr. Gray, Mr. William E. Dunn, Mr. Swan, Mr. Leary, Mr. Lowenstein, Mr. Wallace of the Customs, Mr. Anderson of the Customs, Mr. Williams of the Customs, Commissioner Thompson and others whose identity I do not recall at the present time.

My transcribed records of these interceptions were available to all the other investigators. I doubt if more than two or three had ever seen them. Mr. William E. Dunigan.

*Joseph A. Kozac—For Defendants—Direct.*

808 went over them with me. While Mr. Picarelli and Mr. Heins may have, I don't recall that Mr. Heins saw them. The records were in an office in the Sub-Treasury for this particular case and cases similar to it, an office set up for these cases.

I had never heard of Mr. Geiger. I later identified Geiger, the voice of Geiger, as the name Jiggs that I heard. I never heard the name Geiger mentioned in any fashion. I never heard his voice until I heard these interceptions. I knew nothing about the facts in the interceptions except with respect to the persons named, Jiggs and the others, until I heard other interceptions, except I believe, Mr. 809 Cahill, that I was informed that Geiger was acting as radio man for LeVeque.

Specifically, I knew nothing about any relations between Nardone and Geiger until I made these interceptions. I cannot say definitely that is so as between Geiger and the other defendants on trial, Mr. Nardone, Mr. Hoffman, Mr. Callahan and Captain Brown.

The Court: I think this is most non-conclusive evidence; how any court could derive a conclusion from it I cannot see. The witness has stated the names of about fifteen investigators and I am asked to draw the conclusion the whole case is derived from the intercepted wires. 810

Mr. Cahill: We must feel our way and build up the inquiry. We are on the outside of the inquiry.

The Court: I think if there is to be that kind of inquiry Mr. Dunigan's motion would be well taken. I am not going to try it out on that basis. I thought you had something in mind. I think that testimony should have been met before the trial.

Mr. Cahill: We had no means of knowing.

The Court: You haven't now. The question should have been raised long ago. I thought you had

*Joseph A. Kozac—For Defendants—Direct.*

something specifically arising from this trial you 811  
wished to attack, and that the Court could say the  
jury could not come to a fair conclusion upon from  
the evidence. You seem to be inquiring as to who  
found out—what?

Mr. Cahill: I mentioned it at the beginning of the  
case when Geiger was on the stand, and at the con-  
clusion of it.

The Court: If you had told me then I would have  
ruled. I did not know what the witnesses were going  
to testify to.

Mr. Cahill: We had no means of knowing whether 812  
Geiger was going to take the stand at all, we could  
not tell from anything in our possession what the  
Government would do in making its case or how it  
was going to establish the information which the Su-  
preme Court held was wrongfully obtained.

The Court: The idea of waiting until the Gov-  
ernment has put in its whole case and then attack-  
ing it in this way—my sense of justice revolts and  
it does not make sense to conduct any such inquiry.  
You should have done that at the beginning.

Mr. Cahill: There was no way of knowing what  
was to be testified to, what Geiger was going to tes-  
tify to. 813

The Court: I suppose the hearing would reveal  
what Mr. Kozac found and what each one of the  
others had found.

Mr. Cahill: I couldn't have gotten their witnesses.

The Court: You could have gotten it as easily as  
you have it now.

Mr. Cahill: I had no right to it.

The Court: If you had made your motion you  
would have had the right to it. What is the name  
of the case you just gave me?

Mr. Cahill: That is the Sigurelo case.

*Joseph A. Kozac—For Defendants—Direct.*

Mr. Dunigan: I would like to make this further observation in connection with that case. There is the Agniello case, 269 U. S. All of the cases have indicated that a motion to suppress should be made at the beginning of the trial where a constitutional right has been violated. I think under all the cases the motion to suppress comes too late, after the trial, provided the party could have ascertained that in advance. No constitutional right has been violated.

Mr. Halle: Mr. Dunigan rested and the novel point that has no basis in law in this very case, the United States Supreme Court ruled the right under the statute is that of a right under the Constitution in this very case. In the Silverthorn case and in the Goelet case and in another case the Supreme Court held that a collateral inquiry was proper and should be had and while there are cases as Mr. Dunigan reads them here the Sigurelo case—

The Court: There has never been such an inquiry as you are attempting in this case. If you have any case I should like to be provided with it.

Mr. Halle: The courts have held where the defendants' counsel are not provided with what the Government is going to show they are not asked to make a motion to suppress. In this case here on a preliminary inquiry—supposing we had Mr. Kozac and Mr. Dunn and others in a preliminary inquiry and we bring out they got this evidence from wire tapping, all we could do was to make a motion to suppress such evidence as was illegally obtained. Then Mr. Geiger comes on the stand and we are faced with that proposition by the Government there is nothing to show that they got Mr. Geiger's testimony illegally and that only such as was illegally obtained is suppressed.

The Court: That's right, isn't it?



*Joseph A. Kozac—For Defendants—Direct.*

Mr. Halle: Yes, sir. What we want to bring out 817  
now is that what Geiger knew was obtained from an  
illegal source.

The Court: Suppose it was?

Mr. Halle: I would like to show a case that holds  
that if the identity of a wrongdoer is discovered by  
illegal means there cannot be a prosecution of him  
by any other means.

In the Silverthorn case it says as follows:

"The proposition could not be presented more  
nakedly. It is that although of course its seizure was  
an outrage which the government now regrets, it may  
study the papers before it returns them, copy them, 818  
and then may use the knowledge that it has gained  
to call upon the owners in a more regular form to  
produce them; that the protection of the Constitution  
covers the physical possession, but not any advan-  
tages that the government can gain over the object of  
its pursuit by doing the forbidden act."

The Court: What were the Silverthorn defend-  
ants charged with?

Mr. Halle: In that case there was a paper obtained  
in an illegal manner. It was ordered returned and  
subsequently they tried to use a copy.

The Court: What is the analogy? They were 819  
being prosecuted on that paper and not on anything  
else, not on the confessions of confederates, not on the  
testimony of investigators, but on something of their  
own creation, the original of which had been seized  
wrongly and a copy prepared to be used on the trial?

Mr. Halle: I will show the analogy. In this Sil-  
verthorn case they say the Court disproves the con-  
tention of the Government which contended in that  
case that they could use the knowledge which they  
gained from that paper and it said they cannot do it.



*Joseph A. Kozac—For Defendants—Direct.*

820

The Court: You have to interpret the case in the light of the facts. They had to prove their case by a copy of what they were compelled to return. There is nothing like that in this case.

Mr. Dunigan: I recall that case. Justice Holmes goes further and said although it was illegally seized it does not make the paper sacred.

821

The Court: I do not see anything to this plea. If you heard several investigators and they all testified they listened to wire tapping I would have to find out what they did and try to make it coherent, and then to say they listened to wire tapping and that would prevent a prosecution does not make sense to me.

Mr. Halle: Suppose that information on that paper thus gained contained a name they didn't know about, from the mere name, can the knowledge of that name illegally obtained and an investigation carried out from that point, that would be starting an investigation from an illegal source?

The Court: I would never make any such holding. If that was the law a man who wanted to perpetrate murder could do it and get on a tapped wire and he would be immune.

822

Mr. Halle: This is not merely the fact that a name or a voice was obtained by intercepted messages.

The Court: How does that invalidate the information obtained by these investigators who saw and overheard them?

Mr. Cahill: It is the very basis of the case.

The Court: I know you do, I understand that.

(Short recess.)

The Court: I would hold under the Sigurelo case that the Government's objection should be overruled, but the more I think of this inquisition the less value

*Joseph A. Kozac—For Defendants—Direct.*

I think it has if the only thing you hope to establish 823  
is the original discovery of these defendants was  
through wire tapping.

Mr. Halle: And their relations with one another.

The Court: The fact that they had relations.

Mr. Cahill: Yes, and what those relations were.

The Court: What were they?

Mr. Cahill: Apparently some orders and the in-  
structions given as to the use of boats and things of  
that kind.

The Court: Where is there testimony in the case  
of that kind?

Mr. Cahill: Our contention is it does not have 824  
to be that testimony.

The Court: If your contention is the original  
discovery of their identity I do not believe you could  
ever prove it, but I will assume that the original  
discovery was made by wire tapping and if your  
argument is the whole case is affected by that, I  
would overrule your motion as matter of law.

Mr. Cahill: Mr. Kozac has said he heard the  
interceptions and testified about them in South  
Carolina.

The Court: There has been testimony just given 825  
there were about ten men who investigated. How  
can anyone determine a difference in value of what  
the investigators established in the restaurant and  
his tapping the wire.

Mr. Cahill: If those days in the restaurant vali-  
date what happened over the wires it would be a  
very important basis for this motion.

The Court: Is the Silverthorn case the basis for  
this application?

Mr. Cahill: Not exactly, your Honor.

*Joseph A. Kozac—For Defendants—Direct.*

The Court: It has no more relationship than the man in the moon.

Mr. Cahill: It ~~banned~~ the use of that paper.

The Court: It doesn't do anything of the kind. It does not ban the use of the paper. It does not ban the use of any information the Government got. They refused to find a man guilty of contempt of court in refusing to produce the paper which had been banned by the court.

Mr. Cahill: The logical fact is in the disposition of cases in this court, and I refer to one that occurred four or five months ago by Judge Knox of papers illegally seized and injunction is laid upon them.

The Court: In this case you are trying to lay an embargo on human minds.

Mr. Climenko: I have this in mind, I have thought about this proposition of law, as I have no doubt your Honor has, and while I do not want to bind the counsel in the case because they have their independent duties, I think what is before your Honor, is really a novel question which has never been determined in the precise form it is before your Honor. The constituents of the problem are whether or not you can use information originally obtained by wire tapping, and secondly, as the Silverthorn case holds, whether you can do indirectly that which you cannot do directly. If what has been done here is not in effect a distortion of the rule which the Supreme Court laid down in this very case—

The Court: What was the rule that the Supreme Court laid down in this very case?

Mr. Climenko: That they cannot listen in on tapped wires and come to court and testify to the conversations.

*Joseph A. Kozac—For Defendants—Direct.*

The Court: Exactly.

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Mr. Climenko: What we have here is this: The Government in this particular trial has not produced a witness who testified, "I listened in and got this information and this is what I heard," but the Government, by reason of that offense, learned of the relations of certain persons and then by obtaining a witness whose identity was obtained in that way produces him and his information was obtained only by means of wire tapping.

The Court: What is wrong about that?

Mr. Climenko: The wrong is a ratio of the same thing.

830

The Court: What is wrong about a ratio of the same thing from a different origin?

Mr. Climenko: Because the court has said that evidence in its origin comes from a tainted source and here you are trying to take the taint off by using a different label.

The Court: The Court says the contents of the conversation obtained by what they called the tainted method is bad evidence. Neither the Supreme Court nor any other court has said the same evidence from another source, for instance, from one of the persons talking. I do not see that that is tainted.

831

Mr. Halle: When the Supreme Court had this section before it and rules as it did, we must also look to that portion of the law which says as follows: "No person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same, or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or

*Joseph A. Kozac—For Defendants—Direct.*

2 meaning of the same or any part thereof, or use the same, or any information therein contained for his own benefit or for the benefit of another not entitled thereto," and in the Nardone decision the Court said it is fair to the Government and the Government officers, and what the Government is doing now, is taking that information they obtained from the tapped wires, using the knowledge gained therefrom, and making investigations obtained from that original source and bringing in people whom they have discovered had participated in this alleged conspiracy and that they had discovered over the tapped wires regarding their activities in the conspiracy. I maintain that if the Government had not learned of what they did over the tapped wires they would never have had Mr. Geiger.

3 The Court: Assume that is so, what about it? I will go so far as to assume you could prove that; what about it? They did get Mr. Geiger.

Mr. Halle: They got Mr. Geiger through that source.

4 The Court: I will assume that is the fact. Geiger came in here and testified independently of any wire tapping. Do you seriously contend if they heard Geiger's name over the telephone he could never testify?

Mr. Halle: If they heard Geiger's voice over the tapped wire plus what they heard over the wire, and the leads they obtained and the knowledge gained as to the activities of these people and learned of this and Geiger is brought in as a witness and the Government learned of Geiger's existence, of Geiger's activities, of Geiger's knowledge, from an illegal source, that is our contention.



*Joseph A. Kozac—For Defendants—Direct.*

The Court: Are you dependent on the construction of that statute for that conclusion? 835

Mr. Halle: Yes.

The Court: You mean in the language of the statute nobody could use it for their own use?

Mr. Halle: Or use the same or information therein contained for his own benefit or for the benefit of another not entitled thereto, and that includes the United States and all its agencies.

The Court: I am going to rule against you.

Mr. Halle: For the purpose of this record your Honor assumes we will prove what I have just stated to the Court? 836

The Court: I am ready to state on the record that I will take it for granted that the men of the Alcohol Tax Unit were called and some of them testified they learned of the names of the defendants over the tapped wires.

Mr. Halle: And learned of their activities?

The Court: What do you mean by activities, that they were talking together?

Mr. Halle: That they were discussing over the tapped wires facts and making statements to one another.

The Court: Any specific part of the evidence that you can attack I will pass on. 837

Mr. Halle: We are prepared to try to prove that the witness Geiger, the witness Conrad Mathieson, the witness John Pelletier, the witness John J. Humphreys, the witness Bill Kleb, Mr. Adelman, Mr. Crowley, Mr. Weiss, Mr. Lancaster, Mr. Murphy, Mr. Steinfeld, Mr. Parrot, Mr. Neilson, Mr. Strümmel, Mr. McAdams, Mr. Martin, Mr. Velez, Mr. Ludwig Mathieson and William E. Dunn, that the testimony of those witnesses was obtained—

The Court: I will hear testimony on them.

*Joseph A. Kozac—For Defendants—Direct.*

838 *By Mr. Halle:*

Before I listened in on the first conversation over the tapped wires of the 650-odd messages that I listened in to, I did not know the defendants Nardone, Gottfried, Hoffman, Callahan, and Brown, and at that time I did not know anything at all about these defendants regarding this case. I am not sure that I did not hear about Hoffman prior to the time that I heard his name mentioned over the wires.

839

I learned over these tapped wires some of these defendants knew one another, and that they had what I took to be business activities together, that they knew a man named Jiggs. I didn't know a man by the name of Jiggs before I listened in on the first conversation. I originally learned of Geiger or Jiggs' existence and of his acquaintance with the defendants on trial and of his business associations with them originally from listening in on these tapped wires. I cannot state definitely, Mr. Halle, that I had not heard about the connection of Geiger with this group prior to the time of hearing Jiggs' connection over the intercepted wires with this group.

840

I did not claim to know the identity of this group at one and the same time. It took a period of time, but prior to listening in on the tapped wires I did not know them nor who they were. I did not know anything about this group. So I did not know prior to listening in on the tapped wires that Jiggs or Geiger had anything to do with it. I mean by prior, before the first day in December that I intercepted the messages. I cannot say if it was prior to the time that I may have heard Geiger's voice over the telephone. What I learned about Geiger's business and increased activities and of some of the defendants here I originally learned from the information that you got over the intercepted wires. I cannot say that about all of them. I do not recall that I knew anything about Nardone's connection, Gottfried's con-

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nections, Callahan's connections, Brown's connection. I may have heard prior to that about the connections of Nat Hoffman, about this group, Erickson who isn't on trial, yes. We may eliminate him. 84

Mr. Dunigan: I would like to know whether or not when we speak of tapped wires whether we are speaking of intrastate or interstate.

Mr. Halle: I am making no distinction; I do not know which were intrastate and which interstate. That is peculiarly, if at all within the knowledge of the Government.

I did not know of Conrad Mathieson prior to my listening in on the intercepted messages. I personally obtained his identity and whatever he knew about this case through those intercepted messages. I heard a conversation between defendant Gottfried and Captain Mathieson, several conversations, one of them about March 18 or 19. 84

*By the Court:*

The first conversation was merely a meeting, that he made arrangements merely to go down and see the captain in his office. That was on the 22nd of February or thereabouts. The last conversation was a call to Captain Mathieson from defendant Gottfried in which he told defendant Gottfried he would see him the following day. 84

If Mr. Halle asked if I found out everything over the intercepted wires, then I am wrong.

*By Mr. Halle:*

I did not know of Conrad Mathieson's existence nor about Gottfried prior to listening in on the intercepted wire. It was not through the conversations I heard that I called or

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844. I sent for Captain Conrad Mathieson. It was not through that message that I originally learned of Conrad Mathieson's activities which he testified to on the stand.

I don't think I interviewed Captain Mathieson prior to his going on the stand. I believe Mr. Martin, possibly Mr. Dunigan, probably Mr. W. E. Dunigan, did. I reported what I had heard over the wires to Mr. William E. Dunigan, my superior. To my recollection Captain Mathieson was called in about March 21 or 22, 1936, before anybody knew of that conversation.

845 It is true that prior to that I had heard of a call going to Mathiesons. I do not think we even had the listing of that telephone at that time. I listened in on the conversation between Conrad Mathieson and Gottfried on several occasions. The first was around the 22nd of February.

846 That is about a month prior to the time Mathieson was called in on this case, but at that particular time the connection with Robert Gottfried with this case was absolutely unknown and I made it a habit to check all the conversations that I heard over the restaurant telephone and no listing was obtained for that particular number. Originally so far as I know it was because of these conversations that Gottfried's connection with this case was learned. I was given this assignment; the name Gottfried meant nothing to me, I mean I had not heard of the name Gottfried or of the name Mathieson. I did not know of Gottfried's connection with this case. I was present when the name Mathieson came up. I believe it was on March 21st, 1936, and at that time I had already heard the conversations between Mathieson and Gottfried. I heard of ties on possibly three times at the most.

At that time I don't believe I discussed the conversation that I overheard between Mathieson and Gottfried. It was discussed after the name of the Mathieson Towing Company came up and I believe at that time Mr. Conrad Mathieson

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was already sent for and that the name in the conversation 847  
 clicked in my mind and I then got it out. I had written  
 out the conversation prior to that.

My custom was to write out the conversations the same  
 day, immediately after hearing them. I kept those records  
 in my possession until I had an opportunity to deliver them  
 to Mr. Dunigan. Possibly that same evening or the follow-  
 ing morning. So these messages that I heard between  
 Mathieson and Gottfried had already been written out and  
 delivered prior to March 22nd, and had already been in the  
 possession of my superiors. None prior to March 22nd, 1936,  
 to my knowledge discussed or mentioned Mathieson's or  
 Gottfried's name to me. 848

They may have discussed the name Gottfried. As a matter  
 of fact on March 20th when we arrested the others and when  
 we found those papers we came across the name Mathieson.  
 Of course we had discussed Gottfried. We discussed him  
 prior to the time that I overheard the conversation over the  
 telephone. I discussed Gottfried with Mr. Dunigan a day or  
 two before hearing the telephone messages about Mr. Gott-  
 fried or perhaps earlier than that. I only discussed Mr.  
 Gottfried with Mr. Dunigan after I had heard the voice over  
 the telephone using the word Gottfried or Robbie. Prior  
 to that I did not know about him.

None mentioned Robbie or Robert Gottfried to me prior 849  
 to that time to my knowledge. When I got the assignment  
 to listen over these tapped wires originally, I got it from  
 Mr. William Dunigan but not in person. The Government  
 was pretty well aware there was some skullduggery going  
 on in that restaurant. It first started in the Hotel Astor.

I learned that before I listened in on the first message,  
 after I had been on the wires at the Hotel Astor. I had been  
 on the wires two or three weeks after I learned about the  
 restaurant. The restaurant wire was being tapped also. It  
 started about two or three weeks after the Hotel Astor. It



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850 was after I heard about the restaurant that the wires of the restaurant were tapped.

Besides my assignment there were to my knowledge no other agents tapping wires at the very same time. There were some on that particular restaurant. In my tapping originally at the early stages before the restaurant wire was tapped I had not heard about this restaurant over the wire. The first two or three weeks I heard possibly several thousand messages, but I had not heard the Bellfort Restaurant mentioned over any of these wires at that time.

I listened in on messages over the wire where Cooper, one of the witnesses brought here, was one of the speakers. 851 Wait a minute, I want to change that. I heard the name Cooper over the telephone but I cannot say that I heard Mr. Cooper who testified here talking over the wires. I heard the appointment being made to meet Cooper at Wildwood.

Prior to that time I had not heard of Cooper, nor did I know he lived in Wildwood. Prior to that time I did not know there was going to be a meeting with Cooper in Wildwood, and it was as a result of that conversation that I overheard that Cooper's identity was learned. Mr. William Dunigan had general charge of the investigation.

*By Mr. Climenko:*

852 I believe I listened in to conversations between Geiger and LeVeque. Possibly four or five times. I cannot say definitely today. I did not hear conversations between LeVeque and Geiger with respect to the blowing of a radio tube. I did not obtain any information with respect to Geiger's whereabouts which I heard between Geiger and LeVeque nor that Geiger was in the restaurant or on the outside. I did not know from that that Geiger was the radio operator. I knew there was a man named Jiggs who was meeting these men at the Hotel Astor and other places. I

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first got that information from the telephone messages. I 853  
 did not hear any conversation as to money between LeVeque  
 and Geiger. I never heard anything like that nor did I  
 ever hear any conversation between LeVeque and Geiger with  
 respect to boats or the movements of boats.

I don't believe I heard any conversation between LeVeque  
 and Geiger with respect to proposed meeting on March 20,  
 1936. I did not know of the identity of Humphreys of the  
 Western Union before listening in on the telephone conversa-  
 tions. I may have learned about Kleb—I think I heard  
 about Kleb under the name of Bill the latter part of De-  
 cember, after I began listening in on tapped telephones. So  
 the source of my knowledge as to his existence was obtained 854  
 from listening in on the telephone.

I remember conversations on the telephone in which Kleb  
 was a participant. I think he made a call to Bay Shore,  
 Long Island, about bringing in some alcohol. I learned it  
 was Archie Scarborough. I did not know then but I learned  
 later on that was the fellow down in South Carolina. I  
 presently recall having heard some conversations with Kleb  
 up in Nova Scotia and LeVeque. Kleb being in Nova Scotia,  
 and LeVeque in New York. The conversation was about  
 when she would be able to come out. The pronoun she was  
 the word used. It is fair to say they were talking about a  
 boat. 855

The Court: What has all this to do with this,  
 did he hear conversations between LeVeque and some-  
 body? What has that to do with it?

Mr. Climenko: I am in my own way going through  
 this record.

The Court: This is ludicrous. You have to ask  
 several questions but not to go fishing.

The Court: Mr. Climenko, my purpose is to learn  
 from this witness what he heard over these wires; if

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that is a ludicrous performance I will desist. I have the greatest respect for your Honor and your Honor's patience but this is the way to do it and it should be done here. I will state for the record, so that nobody's patience need be tried, I, if permitted, would have gone on and shown whatever ingredients of this case were obtained by this witness through tapping wires. It seems to me I have already shown a substantial part was obtained and I am ready to desist at that point.

The Court: Mr. Cahill, have you anything you want to ask the witness?

Mr. Cahill: I do not think I have specific telegrams at this moment, but I do want to ask about specific messages taken down at these interceptions.

The Court: The Court, after listening to one witness, concludes as matter of fact that this testimony is incoherent and not conclusive; that the Court now offers to hear an attack on any special part of the testimony that any attorney in the case believes he can fairly attack, as believing it came from no other source, and in default of that I rule the discovery of the complaint has nothing to do with the evidence.

Mr. Cahill: Does your Honor rule that as to the acquaintance of one defendant with another?

The Court: I do.

Mr. Cahill: And their dealings one with another?

The Court: I do not know what that means. I am willing to take testimony on any specific part which you wish.

Mr. Cahill: There are certain telegrams which we wish your Honor to hear.

The Court: Mark them.

Mr. Haile: May I offer in evidence the record of the testimony of the witness Kozac, Martin—

*Joseph A. Kozac—For Defendants—Direct.*

The Court: You have the witness Kozac on the stand. Is his testimony contradicted by those minutes? 859

Mr. Halle: I want to save time.

The Court: I am anxious to save time but I do not wish to do anything I do not want to do and I do not see any purpose in marking the testimony of this witness.

Mr. Halle: We have the testimony of the witness Martin before Commissioner Platt.

The Court: What is the effect of it?

Mr. Halle: On the same general line which we contend most respectfully— 860

Mr. Dunigan: I object to it.

The Court: I sustain the objection.

Mr. Halle: May it be marked for identification?

Mr. Cahill: There are three or four questions and answers which may give your Honor specific sources of information.

The Court: Point them out to me.

Mr. Cahill: I will read them to you.

The Court: Have you any recollection of the defendants' exhibit, Mr. Dunigan?

Mr. Dunigan: No, I have not.

(Marked Defendants' Exhibit A for Identification.) 861

Mr. Cahill: This is the testimony of Martin contained in Defendants' Exhibit A for identification. On cross-examination by Mr. Halle, after testimony regarding the South Carolina operations, on pages 32 and 33, I am directing the Court's attention to these:

"Q. Your attention was originally directed to these men by what you had heard of an alleged conversation over a

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862 tapped wire, is that right? A. I was sent to this place to observe these men and see whether they went into these premises and how long they stayed there.

"Q. And that is all you knew about them? A. No, that is not all I knew about them.

"Q. You knew about them and what happened as the result of conversations that were heard over tapped wires, didn't you?"

863

Directing your attention to that at the bottom of page 33 and top of page 34 on cross-examination of the witness Martin before the United States Commissioner.

With regard to Picarelli, in view of your Honor's ruling I wish to call attention to the record, page 102 of the record of the first trial.

Mr. Dunigan: I do not think that is proper here.

Mr. Cahill: It is an offer of proof.

Mr. Dunigan: But not a proper offer of proof. You have to call your witness.

Mr. Cahill: It has been urged by the Court that he doesn't care to have further witnesses called but we offer something specific.

864

The Court: That's all right. If I am wrong the Circuit Court will order some unfortunate Judge to listen to all of it.

Mr. Cahill: Does Your Honor wish me to offer specific records of interceptions relating to Nardone and some of the others?

The Court: No.

Mr. Cahill: That is what I wish to read with regard to Picarelli. If you do not wish to hear it we stop. We offer to prove it by Picarelli, relating to specific messages brought out in the last trial. I



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include in the offer in evidence the exhibit messages testified to by the witness Picarelli at the first trial. 865

The Court: That is excluded.

Mr. Cahill: May I have this book marked for identification, and we take an exception for all defendants.

Mr. Dunigan: That is a narrative record.

Mr. Cahill: No, the interceptions are in question and answer form.

The Court: You are offering it only with regard to the messages contained in the book?

Mr. Cahill: Yes. I include all of the intercepted messages. I have Picarelli in mind, but I offer all of the intercepted messages recorded in that exhibit. 866

(Marked Defendants' Exhibit B for Identification.)

The Court: Is this an objection to all the testimony, Mr. Cahill?

Mr. Cahill: Yes, your Honor, and to strike out the testimony of the various witnesses recited by Mr. Halle in the offer of proof as being inadmissible.

The Court: That motion is denied and the objection based on the same motion is overruled and all the motions made in the same trial are overruled. 867

Mr. Dunigan: May I have the privilege of calling a witness to the stand?

The Court: Yes.

*William E. Dunigan—For Government—Recalled—Direct.*

868 WILLIAM E. DUNIGAN, recalled as a witness on behalf of the Government, being previously sworn, testified further as follows:

*Direct examination by Mr. Dunigan:*

I came to New York City on November 15, 1935. At that time prior to coming here I was assistant supervisor of the State of Pennsylvania. I came to New York on a special job. I supervised and directed the investigation of this particular case. Associated with me was a committee of three appointed, a representative from the Bureau of Customs, one from the Coast Guard and one from the Alcohol Tax Unit, the first telephone conversation was intercepted in this particular matter. About—I want to be sure about it—I think it was about the 20th or 22nd of December, 1935.

869 I heard the witness Dunn testify yesterday to the effect that he was at the Astor Hotel on December 16th and December 19th, 1935, and that on those occasions he saw the defendants Hoffman, LeVeque, Erickson and George Geiger, and further that he had conversations with the telephone operator in that particular hotel and the telegraph operator of the Western Union. I am familiar with the various telegrams that have been introduced in this case. Those telegrams which were introduced in this case were not obtained as a result of any wire tapping.

870 I had heard of Pierre LeVeque prior to December 20 or 22, when the first conversation was intercepted; and also of Erickson, I had heard of Hoffman described by his first name, and I had heard of Nardone and his first name and described as an Italian.

Dunn went to the Hotel Astor pursuant to my direction given through his superior officer at the time.

Mr. Kozac has testified that the written out intercepted telephone conversations were delivered to me; that's right.

*William E. Dunigan—For Government—Recalled—Direct.*

Q. Did you examine them from time to time as he turned them over to you? A. Yes, I did. 871

Q. Did you ever hear of the name of Leo Murphy in any of those? A. Never.

Q. Did you ever hear of the name Floyd Lancaster in any of those conversations? A. Never was mentioned.

Q. When for the first time did you know of the identity of Lancaster? A. In February or I think January or February when the Pronto was seized off Georgetown, South Carolina.

Q. Did you from the reading of these intercepted telephone conversations know that the Pronto was coming south? A. No. 872

Q. Did you from the reading of any of these intercepted conversations know the whereabouts of the Pronto at any time? A. No, as I remember, the Pronto might have been identified about when it was at Yarmouth undergoing repairs. That is the only time I would remember about the Pronto. I am not sure that the Pronto was named then or not.

Mr. Cahill: We move what might have been be stricken.

The Court: Do you want it stricken?

Mr. Climenko: No. 873

Mr. Cahill: I withdraw the motion.

Q. Did you have information concerning Pierre LeVeque, Bert Erickson and others independent and prior to any intercepted telephone conversations?

Mr. Cahill: We object to that as calling for a conclusion, as being a summary and not calling for specific information and there is no way of testing its relevancy or materiality.

Mr. Dunigan: Question withdrawn.

*William E. Dunigan—For Government—Recalled—Direct.*

Q. Did you know of the identity of Pierre LeVeque prior to any intercepted telephone conversations? A. Yes.

Q. You heard informers in this case, did you not? A. Yes, sir.

Q. And you heard those informers prior to December 20 and December 22, the date of the first intercepted telephone conversation? A. Yes.

The Court: I think we had better adjourn until tomorrow morning.

(Adjourned to March 22, 1939, 10:30 a. m.)

New York, March 22, 1939.

WILLIAM E. DUNNIGAN, resumed the stand.

The Court: Is the testimony Mr. Dunigan has given particularly important on the ruling? If the ruling I make is error, the whole question will have to be tried.

Mr. Cahill: The only reason I have is to protect my record on appeal in the event there is any.

The Court: What I mean is, no matter what the situation is, I assume you are not going into it at great length.

Mr. Cahill: No, I did not intend to bore the Court.

*Direct examination by Mr. Dunigan (continued):*

I stated yesterday that I had more than one informant in this case. Prior to December 20, 1935, I knew of LeVeque's identity as well as that of Nardone, Kleb, Geiger, Saunders and Erickson. My informant gave me information concerning conversations of those persons at the Belford Restaurant.

*William E. Dunigan—For Government—Recalled—Direct.*

I knew of Kleb from the Monololo case and another one. 877  
 I had investigated prior to December 20th to watch the movements of those persons just named. I did not know of Velez prior to March 20, 1936, nor until he was arrested. I did not learn his name through intercepted telephone conversations. I had a conversation with Velez subsequent to March 20th concerning this matter. I did not know of Velez's identity prior to March 20th, nor of Sabio or Babbage. I had conversations with those persons subsequent to March 20th on this matter. The Southern Sword was not seized after March 20th. I didn't know of Velez until after March 20th, nor of the Postal Telegraph men. I didn't know through intercepted conversations that the Pronto was coming south. 878

The Pronto was not seized as a result of any telephone conversation of which I had any knowledge whatsoever. Subsequent to the seizure of the Pronto I went to South Carolina, where I spoke to Lancaster and members of the crew concerning this matter. Velez, when I talked to him, gave me information concerning the tugboat. He said the Southern Sword—the tugboat met the Southern Sword down the bay; he didn't know the name of it, but it had an M on the smokestack. Thereafter I caused an investigation to be made concerning what tug it was with an M on it, and I subsequently had a talk with Mathieson's bookkeeper. I knew the Isabelle H had left Bermuda with a crew on it and I subsequently learnt it had arrived in Yarmouth. The advance information was supplied to me through the Coast Guard. 879  
 After I learned that the Isabelle H had left Yarmouth loaded and had landed empty, I caused a lookout to be made of boats. I would say for this I could name for the record 30 to 35, and in addition to that perhaps 15 or 20 others who worked on this matter. Tapping conversations or intercepted telephone conversations were only incidental. Three of the persons whose names are set forth on that sheet intercepted telephone conversations. This is the list of men that worked on the case that I remember without any memorandum.



*William E. Dunigan—For Government—Recalled—Cross.*

80 *Cross-examination by Mr. Cahill:*

Prior to the interception of those messages I had heard it. Carmine, Frank Carmine, and his other name I heard was Nardone. I expect that the name of Carmine appears in these intercepted messages, but I knew it before. When I testified yesterday in this matter I said I had heard of an Italian named Frank. That was from the first information. I didn't get to the second. I got to the second this morning. Before I picked it up, intercepted these messages, I knew his name, where he was hanging out and who he was hanging out with. Yesterday I said at the Hotel Astor. I didn't get to what I found out, that these people were hanging out at the Astor Hotel. We adjourned before that. I did say that I had heard of Frank, an Italian.

81 Before we began to intercept these messages which contained the name of Frank, an Italian, I knew Frank's last name. I never saw him until he was arrested. I knew the man, where he was hanging out, through other people who had seen him, and the people he was associated with, and after we knew he was sending telegrams and making long distance telephone calls to Canada, not only to one, but different people. That did not come from intercepted messages. As an investigator, it is up to me to find out what people are doing when hanging around the place, and I got the toll slips covering the calls they were making. I got them from the Astor Hotel. Some of them had the names of the persons who had made the calls and they would leave a name for an incoming call. That is unusual.

82 When you go into a telephone booth, it is the practice to pay your money no matter who it is, but suppose you don't get your party, you get your money back, and those situations were controlled by the operator. Stevie kept a check on all of that. I don't know if the usual practice was carried on there, nor do I know the usual practice is not to take names. They were going from the hotel to Canada. All we got were long distance calls, no local calls.

*William E. Dunigan—For Government—Recalled—Cross.*

Briefly, all I knew of Nardone as to his intercepted messages was what I have told you. I could elaborate on it a lot. He was a member of what is known as the International Group. I got the information before the telephone was ever tapped, and the party who told me told me he knew Nat. Hoffman and he knew Nardone. I didn't know the things alleged against the defendants before the intercepted messages. We didn't have the overt acts. We didn't have all those. I didn't even know the Southern Sword came into this port until after the telephone tapping was over with.

I knew a boat was moving around through interception of wires or radio. Of course, we knew the Isabelle H was down in St. George. We watched it. We didn't know the Pronto was seized. As I said yesterday, I will not say the name Pronto was mentioned, but no other boat was mentioned in any telephone call, so the name of a boat was not mentioned. There was never a point of landing mentioned, and I, personally, I would say this, as far as telephone calls are concerned, that if that was all we had, we would never have made the seizure in this case.

I didn't know some of the transactions related to prices.

*By Mr. Halle:*

I didn't know Robert Gottfried until his name first came in over the telephone conversations. I just read his name in some of the telephone conversations, but I couldn't place who he was.

(Short informal recess.)

I heard of Robert Gottfried for the first time, I would say, four or five days or maybe a week before the seizure of the Southern Sword, before the arrest, before March 20th. I got his name out of the telephone intercepted messages I was studying. After getting his name from the intercepted messages, I got the name of the Mathiasen Shipping Company

*William E. Dunigan—For Government—Recalled—Cross.*

886 through an investigation on information given me by Velez. At that time we didn't check the number of the Mathiasen Shipping Company. It was there, but we didn't check it.

I contacted Mr. Mathiasen, that is Conrad Mathiasen. I might have spoken to him about this telephone call after I got him up there. If I went to see Mr. Mathiasen or he came to me and I spoke to him about this telephone call between him and Gottfried that was intercepted he denied it then. He conceded it after his bookkeeper made a statement to me. In other words, I asked him if he had a telephone call to Mathiasen, and he denied it. Then I spoke to the bookkeeper, and I jogged Mathiasen's memory through the bookkeeper. That was the first time I placed Gottfried as having anything to do with the case. I knew about the telephone call prior to the time I went to Mathiasen's, but it didn't mean anything to me. I don't remember saying anything to Mathiasen about the telephone message. I said a moment ago if I did, he denied it. He denied everything I asked him. I don't remember talking to him about that. I sent for Mathiasen because of what Velez told me. I called the bookkeeper to find out what tugs went out and who paid for the tugs, and he incidentally told me of a little fellow who came and I then felt it was Gottfried. And using the telephone call and his memory, I got Gottfried.

888 *By Mr. Climenko:*

I made mention of the seizure of the Monololo case; I mean the Monololo which was picked up off the coast of Long Island. It was that case made by the Customs, and all I got was the parties connected with it. I don't know when it was made. It was before I came up here on this detail. I came up on November 15, 1935, but it was made before that. I wouldn't say I have no way at the present time of ascertaining when it was made. When I say it was made, I imply the boat was seized and an investigation was made,

*William E. Dunigan—For Government—Recalled—Cross.*

and I knew at that time that Kleb was connected with that investigation. That is how I came to speak about the Monololo a while ago. I didn't talk to Kleb until after this case here personally, myself.

I don't know when the first time that anybody working for me, in my department, talked with Kleb, but it was some time during 1935. He was connected with still another case. The first time that I know of anyone seeing Lancaster—let me put it this way: The first time I knew who Lancaster was, that it was Lancaster, was the day he was sentenced in South Carolina. Prior to that I knew him and everybody working with me knew him as Michael Sykes, and later we identified him as the Lancaster who was also arrested in connection with the Monololo.

I knew Geiger through hearsay prior to the telephone taps. I had never seen him. In the course of making these telephone taps, Geiger's name was reported to me, not as Geiger, but as Jiggs. Telephone conversations in which he participated were reported to me. I wouldn't testify, without refreshing my knowledge, of any interceptions in which Geiger was a participant. Besides being unable to give the substance of any conversations, I can only give you my impression at the time, and that was not definite, but I assume for the purpose of conducting the investigation we imagined that he was a radio operator. I wouldn't say I thought an inkling or intimation of that fact would be revealed to you by these telephone calls. In the course of making an investigation you have to imagine things and reconstruct. I would say from reading telephone conversations and by other matters pertaining to the investigation, I would say he had something to do with the radio.

I got information with respect to telephone conversations made by LeVeque or Erickson to Kleb and the others being in Yarmouth, Nova Scotia, but I do not think any telephone conversations went there in the name of Kleb. It was some other name. The name was Walter Adams. I did not get the telephone conversations from what was reported to me.



*William E. Dunigan—For Government—Recalled—Cross.*

892 I have no recollection of the substance of what was reported to me from those interceptions other than to say he was working in conjunction with the smuggling operation. When I say "he," I mean Kleb then using the name "Walter Adams." Of course I got the information, whoever was making the investigation here in New York City got the impression that the man here was talking to Kleb or Adams. I heard about telephone conversations in which the other defendants were participants, that they were parties to the call. I think telephone conversations were intercepted on each and every defendant here on trial and others. And that, of course, would include the defendant Hoffman.

893 I had known the name Hoffman by reason of the fact that some such information about his existence had been given to me by an informer. I would say that was merely information which aroused my suspicion, if there was any evidence at all, but the party who told me and who gave me this information knew Hoffman personally and the business he was in, smuggling with the other three parties, and they were known as the International Group. That was information given to me, but I had no proof, just had suspicion. From that point on, one of the things done in connection with the preparation and construction of the proof in this case was the tapping of the wires. And in the course of

894 listening to my subordinates, they revealed to me certain facts they learned about Hoffman through the telephone calls. They reported to me from the messages as they wrote them down. Each day I received these messages and wrote them down.

I went to South Carolina after the boat was seized. I don't think I ever spoke to Geiger in my life. I probably directed my assistants to speak to Geiger. I couldn't tell you which one. I would testify here as to details if I directed him to discuss with Geiger the defendant Hoffman. In fact, I don't think Geiger ever gave information up to the time he was indicted in South Carolina himself per-



*William E. Dunigan—For Government—Recalled—Cross.*

sonally. I did not receive telephone conversations in which Velez was a party. I personally discussed Hoffman with Velez. I did not ask him about anything as to which I had learned from telephone conversations. I described Hoffman to him and asked him if he knew Hoffman and had seen him up around that place and the other places with the other outfit, because Hoffman was not arrested at that time.

All that Velez told me was that he had seen Hoffman around. Most of Velez's talk was with LeVeque. Apparently he was more friendly with LeVeque than with anybody else, but he did tell me of several conversations with Hoffman and the others sitting at the same table.

*By Mr. Cahill:*

There are in evidence certain money orders and applications for money orders and telegrams. I got them under subpoena after the seizures were made.

Before that I had never seen them myself, but one of my men, I think one of them testified here that he saw a copy of a couple of those telegrams. I don't think we kept records of these intercepted messages—I think we have copies of them in the file, but the original intercepted messages in the handwriting of the man who intercepted I think is in the hands of the District Attorney or was.

In the course of the investigation of this case from time to time, during the whole course of the investigation, since we got these records of intercepted messages, my men and I have referred to them from time to time. I would run them over half a dozen times. I did not give many to the men to do. I would say as a guess not more than four or five people have seen these intercepted messages, outside of the three men who took them, and those four or five men were from the Alcohol Tax Unit, and members of the committee of which I was a member, they cooperated with

*W. E. Dunigan—For Government—Recalled—Redirect—  
Recross—Redirect.*

898

me in the investigation; those copies were not used in the course of my and their investigation; they were kept as secret as possible. I doubt if more than three people saw them in my unit. Of course, there was a member of the Coast Guard and a member of the Customs that was on this committee with me. They saw me.

*Redirect examination by Mr. Dunigan:*

I said that I read intercepted messages of all the defendants on trial; I didn't mean to include Captain Brown.

899

I don't know if this intercepted telephone conversation of Gottfried to Mathiasen was an intrastate message, if it was a local call. It was not a long distance call; that is, it could not be determined as a long distance call but as a local call.

*Recross-examination by Mr. Halle:*

A call to Jersey City would be a little different. You would have to call a number. You couldn't dial it. I would call that a toll charge. Yes, I call it long distance.

900

*By Mr. Dunigan:*

At the time of this message to Mathiasen, the telephone was under my supervision. It was New York, Belford Restaurant. Mathiasen is in downtown New York City. That call from the Belford number to his place of business in New York was intercepted. I do not know that of my own knowledge. The telephone number was dialed, and the telephone book gives the location of that call.

*Motions to Dismiss.*

Mr. Halle: In behalf of the defendant Gottfried, I submit that it appears now that Gottfried and whatever connection the Government claims he had with this case was discovered by means of conversations overheard on tapped wires and from that source further information was obtained which resulted in his arrest here, and in view of the decision of the United States Supreme Court in the Nardone case, I move that the evidence as against Gottfried be stricken from the record on the ground it was illegally obtained. 901

The Court: I deny that as a matter of law and also on the ground the basis of fact does not correspond with your statement.

Mr. Halle: Exception. 902

Mr. Cahill: For the reason given, that the evidence of various witnesses whom I am about to specify, that the evidence given by them represented the fruits of illegal tapping of wires, I move that the testimony of the following witnesses be stricken and the jury be instructed to disregard that evidence: George Geiger, John J. Humphreys, John Pelletier, John Edward Pike, Mr. William Kleb, Miss Edelman, Miss Crowley, Miss Weiss, Mr. Lancaster, Mr. Parrot, Mr. Steinfeld and Mr. Cooper; also Mr. Neilson, Mr. Strummel, Mr. McAdams, Mr. Geiger and Mr. Dunn, Mr. Carr. This motion is made on behalf of all defendants.

The Court: Motion denied. 903

Mr. Cahill: Exception for all defendants.

We move also to strike from the record testimony as to conversations of Geiger with LeVeque upon the additional ground that it is not connected with any of the defendants and is immaterial and irrelevant as to them.

The Court: Motion denied.

Mr. Cahill: Exception. We move that the testimony of Geiger and the testimony of Kleb and all other persons relating to the alleged shooting incident at the Keansburg Pier be stricken from the record.

The Court: Motion denied.

*Motions to Dismiss.*

904 Mr. Cahill: Exception.

We move that the testimony of Pike as to seeing the Pronto, and Captain Conrad, and Exhibit 31, the picture, be stricken as not connected with any of the defendants, and being irrelevant and immaterial.

The Court: Motion denied.

Mr. Cahill: Exception.

We move that Exhibit 32 be stricken from evidence. That is, the box alleged to have been seen on the Pronto, which has been before the jury during the whole time.

The Court: Motion denied.

Mr. Cahill: Exception.

905 We further move that the testimony of Kleb as to his dealings with Van Austen be stricken.

The Court: Motion denied.

Mr. Cahill: Exception.

With regard to that shooting incident at Keansburg, I thought the Court would wish to have that called to its attention again so that there might be a specific ruling.

The Court: I will deny your motion as to that.

Mr. Cahill: Exception.

906 We move that all testimony relating particularly to the testimony of Kleb and the testimony relating to the Monololo, particularly the testimony of Kleb that the Monololo was running alcohol and that there was a trip made by him with that but the cargo was lost and the question asked, "Did you intend to pay a duty on that cargo?" we move that all that testimony be stricken.

The Court: Motion denied.

Mr. Cahill: Exception.

We move that Kleb's testimony with respect to business dealings with LeVéque beginning some time in 1935 be stricken.

The Court: Motion denied.

Mr. Cahill: Exception.

*Motions to Dismiss.*

Mr. Climenko: With respect to that portion of the testimony of the witness George Geiger which relates to assertions repeated by Geiger in court here and calling LeVeque, as to the identify of LeVeque's partners, particularly with reference to the defendant Hoffman, I move to strike that testimony as it was offered in a manner not binding on Hoffman. 907

The Court: Motion denied.

Mr. Climenko: Exception.

With respect to the testimony of the witness Lancaster, who spoke of two occasions which he could not identify as being in December, 1934 and January, 1935, we invite your Honor's attention to the indictment, the conspiracy being alleged to have been hatched in January, 1935, and we move to strike that testimony from the record upon the ground that in view of the witness' inability to identify time it would appear that these two transactions had nothing to do with the conspiracy. In any event, it would not appear there was any connection with anybody besides Lancaster and Hoffman, and therefore was not part of this conspiracy both chronologically and in substance. 908

The Court: I do not think it was offered as such. Motion denied.

Mr. Climenko: Exception. May I say in that connection that that motion is predicated on the authority of your Honor desires this authority, of *Minim*, 57 Fed. (2d) 506 and *Morrell v. United States*, 11 Fed. (2d) 256. 909

And the motion is also made on this theory: if the evidence was not introduced on the theory that it connected the defendant Hoffman with the conspiracy count, the third count of this indictment, then it should never have been introduced because it referred to an independent transaction.

The Court: What do those cases say?

Mr. Climenko: Those cases refer to transactions where the United States offered proof of events before or after the termination of the conspiracy.



*Motions to Dismiss.*

10 The Court: On a trial for conspiracy is there any doubt that after an indictment proof of prior or subsequent crimes are inadmissible?

Mr. Dunigan: There is no doubt in my mind.

Mr. Climenko: It seems to be there was from the few authorities I have here.

The Court: I will read them.

Mr. Climenko: I take it that your Honor for the time being suspends judgment on that motion.

The Court: All right.

11 Mr. Cahill: The motions made to dismiss the indictment are renewed, and we move now to dismiss the indictment as to all of the defendants on the ground the Government has failed to make out a case under any of the counts.

The Court: Motion denied.

Mr. Cahill: Exception.

Mr. Climenko: With respect to the defendant Hoffman, may I be heard for one moment as to counts 1 and 2?

The Court: Certainly.

(Argument off the record.)

12 Mr. Climenko: With respect to Hoffman, there is no showing that he had anything to do with any boat that brought alcohol in, that he was anywhere near the scene, that he knew anybody who took any part in that enterprise, and I do not want to repeat the same idea, but I do believe this record is barren with respect to Hoffman as to counts 1 and 2, and it seems to me almost from the beginning of the 10 days of testimony we have had here there is nothing to connect him with these particular counts. I do not mean to be dropping the third count, but I do think I should bring to your Honor's attention what I have said as to counts 1 and 2.

The Court: I will deny the Hoffman motion.

Mr. Climenko: Exception.

*Motions to Dismiss.*

Mr. Halle: May I make the same motion on behalf of the defendants Gottfried, without repeating all that Mr. Climenko has said on behalf of the defendant Hoffman, on the same grounds, and I wish to point out to the Court here that as regards Gottfried, there is not a scintilla of evidence of him having anything to do with the substantive offenses in any case, manner or form. I am addressing my motion to counts 1 and 2. The only evidence here is that he was arrested. Mathiasen's testimony was innocuous, meant nothing; and that he was observed at one time walking out of the store with some of the other defendants. That is the only evidence against Gottfried. 913

The Court: I deny your motion. 914

Mr. Halle: Exception. I also address my motion now to the third count, that there is no evidence sufficient to send to the jury the question of Gottfried's participation in the conspiracy.

The Court: Motion denied.

Mr. Halle: Exception.

Mr. Cahill: All defendants enter in those motions and enter an exception.

Mr. Nolan: On behalf of Callahan, I also move to dismiss the counts of the indictment on the ground there is no evidence showing that the Southern Sword brought any alcohol or that they were bound to invoice or manifest any merchandise they brought in and that the Southern Sword by taking cargo on, if they did, off Winter Quarter Lightship, it was not bringing articles in from a foreign country, so that it was liable to pay duty. All defendants join in that motion. 915

The Court: What motion? Your motion?

Mr. Nolan: Yes, sir.

The Court: Motion denied. Exception to all defendants.

(Recess to 2:00 p. m.)

*Motions to Dismiss.*

916

## AFTERNOON SESSION.

The Court: I will deny Mr. Climenko's motion on which I reserved decision.

Mr. Climenko: Exception.

Mr. Cahill: The defendants rest, if the Court please, and we now renew all the motions made previously at the close of the Government's case.

The Court: I will excuse the jury.

(The jury retired.)

The Court: Do all defendants rest?

917

(All defendants rest.)

The Court: How about Gottfried on these substantive counts?

918

Mr. Dunigan: In the record there is testimony to indicate that Gottfried appeared at the Belford Restaurant on March 20th. It was on that day that he went into the men's room. Of course, Nardone went in. There are three very incriminating pieces of paper found in that group of papers. I am not prepared to say they were Gottfried's or whose they were, but the fact remains that that group of papers so far as identifying marks are concerned, there are any number of papers that belong to Gottfried. Your Honor will recall that one of the papers had "6 Winter Quarters", that Gottfried knew of that meeting. There is evidence that he is in the conspiracy if he knew of that meeting. Everything would indicate that he knew of the conspiracy, and if he assisted in any way, that would make him part of the conspiracy.

The Court: I would say that piece of paper may indicate he was part of the conspiracy and I will allow the jury to say. If he was in the general scheme and had knowledge of this transaction, I think that would be sufficient to indicate he aided and abetted, because he didn't reveal

*Motions to Dismiss.*

it to the police—not because he didn't reveal it to the police, 91  
but if he is still in the enterprise he is connected with it,  
and these papers indicate he knew of this meeting, and if  
it is established he knew of the enterprise he is still in it  
so far as those papers indicate.

Mr. Halle: Don't you think there is a difference in  
the conspiracy—assume that he had knowledge and the  
papers establish it, how is it indicated that he aided in the  
importation without paying the tax?

Mr. Dunigan: I can only say what I said before, that  
he has been linked with this group in this conspiracy to  
smuggle in alcohol. He is still in it. The evidence shows  
that on March 20th—I cannot say any definite act on Gott- 920  
fried's part—to indicate that he helped bring that stuff in,  
on the evidence that I have, but I can say this, that he has  
been identified as associated with the enterprise. He asso-  
ciated with the group and had knowledge of this stuff com-  
ing in.

The Court: But what proof is there on the substantive  
count?

Mr. Dunigan: I think there is also evidence on the sub-  
stantive count. Mr. McKnight has just called to my at-  
tention—of course, we did not definitely establish who those  
persons were, but Velez's testimony to the effect that Cap- 921  
tain Brown showed him a piece of paper with the name  
"Gottfried" on it and said so far as he knew they were  
the owners of the cargo, that was after the ship had left  
Newport News.

Mr. Halle: But Captain Brown said he did not know  
Gottfried. There must be evidence on these substantive  
counts that he committed the offense and not that anyone  
else committed it.

The Court: I think that that is so. I think if he  
knew where Nova Scotia was and Keansburg, there is no  
evidence that he was there, and I wouldn't hold a man inno-

*Motions to Dismiss.*

cent who knew of a crime and did not reveal it, but I do not see that it can be held to specific acts unless there has been evidence of his participation and assistance.

Mr. Dunigan: I do not know whether your Honor saw that exhibit or not, one of the cards found in this group of papers. As I say, all of the facts point to the proposition that all of these papers were Gottfried's. On one of the papers found in there there was the Mathiasen Towing Company written out, and on some of the other cards there was Mathiasen's telephone number. On one of the cards found in the group was the card of the Alco Steamship Company, Callahan's company, and on it it said, "They know where I am," Callahan's home number and his office number listed on the card, and all of these things indicate association and dealings between Gottfried, Callahan and Mathiasen, and Mathiasen's tug went down to meet the Southern Sword. Those facts linked with the other matter like six miles east of Winter Quarters Light links him.

Mr. Halle: But that is long prior to the time we are on trial for, and his action was in relation to a matter not involved in this trial, but was linked with the sale of a boat, and the commission involved.

The Court: I am going to leave the consideration of the papers to the jury.

Mr. Halle: Assume they came from Gottfried, they would not disclose any evidence of importing liquor or of facilitating the transportation of liquor that was imported. The Ramono case, 9 Fed. (2d) in this Circuit, where the Court said: "Where you charge a man with smuggling, you have got to prove it"—that is the case where a boat was found in Huntington Harbor empty. I think there were a few cases of liquor left on the wharf. A day prior that same boat was seen on outside waters with about four or five thousand cases of liquor, and they tried to show it could not have come anywhere else but in the United States



*Motions to Dismiss.*

because this boat had this liquor on it right outside of the limit, and the following day the boat was found in the harbor on Long Island Sound without the liquor, and the Court said that was not proof of importation into the United States. 925

The Court: Motion denied.

Mr. Halle: Exception.

Mr. Cahill: We renew the motions heretofore made now that we have reached the close of the entire case.

The Court: Motions denied.

Mr. Cahill: Exception.

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(The defendant Hugh Brown, summed up on his own behalf.) 926

(Mr. Nolan summed up on behalf of the defendant Austin L. Callahan.)

(Mr. Halle summed up on behalf of the defendant Robert Gottfried.)

(Mr. Climenko summed up on behalf of the defendant Nathan W. Hoffman.)

(Adjourned to March 23, 1939, at 11:00 A. M.) 927

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New York, March 23, 1939; 11:00 A. M.

TRIAL RESUMED.

(Mr. Cahill summed up on behalf of the defendant Frank C. Nardone.)

(Recess to 2:05 P. M.)

(Mr. Dunigan summed up on behalf of the Government.)

*Defendants' Requests to Charge.*

28 : Mr. Climenko: On behalf of all the defendants an exception is taken to the last remark incorporated in Mr. Dunigan's summation, the substance of which was that the jury must convict the defendants in this case because the testimony stands uncontradicted. That amounts to a statement of calling to the attention of the jury that the defendants did not offer proof and that they did not themselves testify.

I desire also to take exception to the fact that the Monololo incident is part and parcel of this case, because as I understand your Honor's ruling with respect to that testimony, your Honor held that testimony was not connected with the crime of conspiracy alleged in this indictment but was in the case for an entirely different purpose.

29 Also on behalf of the defendant Gottfried I am compelled to do this by reason of Mr. Halle's absence, and take exception to Mr. Dunigan's statement on the ground that it was erroneous and that it is for the jury to determine that the papers Mr. Dunigan referred to had belonged to Gottfried. That is a question of fact.

We also take exception to the remark of Mr. Dunigan that the shooting incident was admissible against any conspirator whether he was in the conspiracy at that time or not, as a matter of law.

30 We also take exception to the statement of Mr. Dunigan as a matter of law that LeVeque could not be prosecuted for the conspiracy in this district because he had been prosecuted in South Carolina or wherever he was prosecuted.

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(The following defendants' requests to charge were respectfully submitted to the Court):

1. The defendants are charged in the first count of the indictment solely with the following crime:

(a) Smuggling and clandestinely introducing 9600 gallons of alcohol into the commerce of the country.

*Defendants' Requests to Charge.*

2. The defendants are charged in the second count with concealing and facilitating the concealment and transportation of alcohol after it had been unlawfully brought into the country. 931

3. Evidence tending to show the smuggling of any other alcohol by any person is not evidence on which you may base a verdict of guilty against any defendant under the first or second count.

4. Evidence tending to show the smuggling of alcohol by any persons other than the defendants on trial is not to be considered by you in determining the guilt or innocence of the defendants under the first and second count, unless it is shown that the other persons were acting for or in concert with the defendants. 932

5. There is no evidence that the defendants or any of them concealed the alcohol referred to in the second count.

6. There is no evidence that the defendants or any of them facilitated the concealment or transportation of the said alcohol, after it had been unlawfully brought into the country.

7. If you find that there was not the one conspiracy alleged in the third count but several independent conspiracies, you must acquit the defendants. 933

8. Mere association of a defendant with persons engaged in a conspiracy in and of itself is not enough to make him a party to the conspiracy.

9. Knowledge on the part of any defendant that a conspiracy is in progress and that acts in furtherance of it are being done, is not in and of itself sufficient basis for a verdict of guilty against that defendant.

*Defendants' Requests to Charge.*

934 10. The fact that any defendant does not take the stand or offer evidence on his own behalf is not to be considered by you for any purpose or in any manner.

11. The fact that an indictment has been filed is no evidence whatever as to the guilt of any defendant and must not be considered by you as evidence in determining whether any defendant is innocent or guilty.

935 12. Each defendant is presumed to be innocent and this presumption continues throughout the trial until such time as you may find that the presumption has been overcome by evidence proving the guilt of the defendant beyond a reasonable doubt.

13. The burden of proof rests upon the Government throughout the trial of establishing the guilt of each one of the defendants beyond a reasonable doubt.

14. No evidence of the act of a co-conspirator in furtherance of the conspiracy can be considered by you against any defendant unless and until you have found beyond a reasonable doubt that the defendant had entered into the conspiracy.

936 15. No evidence of any alleged crime other than the alleged crime described in the indictment can be considered by you as evidence of the guilt of any defendant, unless it is shown beyond a reasonable doubt that the said other crime was committed in furtherance of the conspiracy and the defendant against whom it is being considered knowingly and wilfully participated in the said other crime.

16. You are not allowed to find any defendant guilty of the crime alleged in the indictment, because you may form the opinion or reach the conclusion that the defendant committed some other crime.

*Charge of the Court.*

17. Before you can find any defendant guilty either of the crime alleged in the first count or the crime alleged in the second count, you must find, beyond a reasonable doubt that the alcohol was brought into this country from a place outside the country, and also that the alcohol was not entered, as required by law, and that the duty due under the law, if there were any such duty, was not paid.

**Charge of the Court.**

The Court (CLANCY, J.): Members of the jury, because the defendants' attorneys have recited parts of the evidence, as they have seen it, I will refer to it only as I have to in the course of this charge.

(At this point alternate jurors Nos. 13 and 14 were excused.)

The Court: Anything I do say in the way of a statement of fact, or anything the attorneys have said, either the United States Attorney or the defendants' attorneys, if it does not agree with your recollection of the testimony, you may reject it.

Any conclusion as to the guilt or innocence of the defendants should be founded on your recollection of the testimony and not on any statement I make or any statement any of the attorneys have made during the trial or summation. It is subject to your recollection.

I instruct you that an indictment is merely a pleading and has no evidentiary value, and is in the case only to advise the defendants of the nature of the charge or charges against them. It has three counts. There are five men being tried, Frank Carmine Nardone, Austin L. Callahan, Hugh Brown, Robert Gottfried, Nathan W. Hoffman.



*Charge of the Court.*

940 As I have said, there are three counts in the indictment, each of which is a separate crime, and you will have to decide the guilt of each of the five defendants on each one of the three counts.

It is the law of the United States, and these men are charged with having transgressed it under count 1, that if any person unlawfully, wilfully and knowingly and with intent to defraud the revenue of the United States, smuggles and clandestinely introduces into the United States without making dutiable consumption entry thereof at the United States Customs House and Port of Entry with the United States Collector of Customs and without paying the duty thereon (in this count 9,600 gallons of alcohol), which merchandise was subject to duty and should have been invoiced, and so forth, violates the law.

941

The elements of the crime are knowingly and wilfully—wilfully includes knowingly—introducing customs into the United States clandestinely, that is merchandise required to be invoiced. There has been testimony that alcohol has to be invoiced.

It is also the law of the United States that whoever directly commits any act or who aids, abets, counsels, commands, induces or procures its commission, is a principal. So on the first count you have evidence—of course it refers to the 1600 cases, that is the number of cases said to have been on the Southern Sword and taken off at Pier 72, North River,—I suppose you can say that Captain Brown, if he was on the Southern Sword and knew that that alcohol was on there, was in possession of it. Callahan, the testimony is, got on the boat and may have been in possession of it. You cannot carry 1600 cases under your arm, but if you find any of these five men was in possession of it, that is enough to bring conviction under another section of this law, that is, if he has possession of the goods that have been clandestinely introduced into the United States, such goods as

942

*Charge of the Court.*

this alcohol; and, as I have said, anybody who aided, abetted, counselled, commanded or assisted is a principal and is as guilty as he is. 943

There is testimony by Velez, I think, that LeVeque told him he disposed of this cargo, which of course would require possession, but it would also require introduction into the United States and the circumstances of its introduction, which, if you believe the testimony, of course, was nothing else but clandestine. In that case anybody who assisted LeVeque in introducing this alcohol into the United States with intent to defraud—you also have to have wilful intent to defraud the United States Customs—is just as guilty as LeVeque was if he disposed of it, or as the captain was if he brought it to Pier 72, North River. 944

If any person knowingly or fraudulently brings into the United States, or assists in so doing, any merchandise contrary to law, for instance, alcohol, which it is said must be invoiced and was not here invoiced, or conceals, sells or transport or facilitates the transportation of, knowing it to have been brought into the United States in that manner, is guilty of a violation of the law.

There is evidence that there were three trucks on Pier 72 and you may, if you believe the testimony, find the inference reasonable that the alcohol which was taken off by 20 longshoremen, according to the testimony of Velez—I think it was of that Moro mate—was transported, and you may also take into consideration, if you believe Velez's statement, that LeVeque sold it. That would be a violation of the law and anybody who assisted in so doing is just as guilty as any one of them. 945

The third count is a conspiracy count against these five men that have been named, and LeVeque, Kleb, Van Austen, Conrad, Duçose, Saunders, Geiger, Lawrence, Sweeney and Jack Baker, and others not named. Of course it is perfectly possible to conspire with a person the Government cannot find or name and entirely possible to conspire with a person

*Charge of the Court.*

946 not subject to the Government's jurisdiction, so there is nothing to criticize in prosecuting these five men and not the others. Mr. Dunigan has explained that to you, but it is no part of the case. That would be solely a question of law for me.

A conspiracy is a combination of two or more persons by concerted action to accomplish an illegal end; or even if the end was not criminal or illegal, to do it by illegal means and some act committed to carry out the object sought.

947 I will let you take a copy of the indictment with you and that will save me from repeating the overt acts. There is direct evidence or proof of them, conversations had at the Astor and the restaurants and the checks sent to Bermuda and Yarmouth. One of them is a conversation alleged between Gottfried and Mathiasen, and that Mr. Dunigan has referred to in his summation. The inference of that proof I do not know. I will instruct you in that regard to consider that and come to your own conclusion, but as to the other acts there is direct evidence. You must determine whether you believe the witnesses or not.

948 An overt act essential to a conspiracy need not implicate all the defendants nor need it be a criminal act, much less constitute the very crime which is the end of the conspiracy. It need not be an act calculated to attain the end of the conspiracy; indeed a defendant need not have knowledge of the acts of the other conspirators. If he is in the scheme he condones and sanctions the acts of the other conspirators as his own.

While it is true that the acts and even the statements of the other conspirators, of any conspirator, become the acts of the other conspirators, I charge you that you must find the fact that any one of these participants, any one of these five men, is a member of the conspiracy from evidence touching him directly and not from hearsay statements of the others.

*Charge of the Court.*

It is impossible for me to review every bit of evidence in this case, so I will instruct you the guilt of any defendant depends on your finding that any defendant embraced and took part and became a part of the conspiracy. 949

The defendants have asked me to charge that mere association is no evidence of guilt, and mere knowledge of conspiracy is not sufficient to embroil a man, to make him a party. There is no doubt that both of these instructions are good law. The Government is not charging these men with associating. They have described the association in conversations having to do with bootlegging operations. They weren't concerned with discussing the sailing of vessels to China, or the weather in Florida, but with bootlegging operations and the Pronto and the happenings at Keansburg and Freeport, and sending messages to South Carolina and all the other matters involved in this conspiracy. 950

The mere knowledge that there was a conspiracy is not necessarily putting them in the conspiracy. You or I or Mr. Dunigan could know of a conspiracy, but if we took no part in it we could not be prosecuted for it. The evidence of the Government is that all of them knew of it and it is charged they knowingly became part of the conspiracy, but that is for you to say. The instant when one entered into the conspiracy is not important, but the fact that he entered into it is of importance, and this fact must be found from the direct testimony. 951

I distinguish direct testimony from that which would be ordinary hearsay. If I heard your foreman making a statement, I could testify to that anywhere. That would be direct evidence. If your foreman tells me that one of you did something or said something, that would be hearsay because when I testified to it you would be hearing that from a witness not sworn, and therefore it would be hearsay.

I instruct you that you may consider all the direct testimony affecting any defendant and if and when you find that any of the defendants has entered into the conspiracy,

*Charge of the Court.*

952 then I instruct you that all the acts and statements of any one else you find is in the conspiracy become his acts and statements. That goes so far that if you find that one of the members of the conspiracy was in Yarmouth and the other at Keansburg—I am just offering this as an illustration and not as a fact—that it may be possible one conspirator may be at Yarmouth and the other at Keansburg—and if that is so the man at Yarmouth would be just as much a part of the conspiracy as the man pulling the trigger, so to speak, but before you can so find you must find from the direct evidence that he is in the conspiracy.

953 I instruct you further that evidence is either direct or circumstantial. Conversations carried on in the presence of a third person may be circumstantial evidence against that third person. Direct evidence against one may be circumstantial evidence against another. Take Barney Cooper's story that LeVeque visited him at Wildwood, New Jersey, and that LeVeque asked him to get a boat, using Cooper's language, and he thereafter used Nardone's automobile for a trip up or down the coast to consult one of the captains about a boat. If you believe that, that would be direct evidence against LeVeque and being made in Nardone's presence would be circumstantial evidence against Nardone. Circumstantial evidence is just as good evidence as direct evidence, and there is only one difference, and that is, any construction of circumstantial evidence compatible with innocence must be given a defendant or defendants and in any conclusion you come to after determining it is circumstantial evidence you must give him the benefit of the doubt.

954 In other words, circumstantial evidence must be conclusive. Sometimes it is better than direct evidence. In anything I say I am giving you the illustration, not that I consider it of supreme value or that I intend to bring Nardone into the case or any others, but to construct my charge. I instruct you now that any findings of fact must be from the testimony of the witnesses.



*Charge of the Court.*

The evidence as to Hoffman being at Freeport late in 1934 or early in 1935 was described by Lancaster. His recollection was so indefinite that he could not say whether it was late in 1934 or early in 1935. 955

The conspiracy in this case is alleged to have started on the 2nd of January, 1935.

The conspiracy which I will now refer to is the bringing in of this vessel, the Rydoon, which it is alleged was loaded with alcohol in Antwerp, alcohol in those cases of two cans of three gallons each. You had had photographs of the operations of them, one of the Rydoon and the other of the Pronto or Isabel H, taking liquor off on the high seas; the Isabel H taking it into St. Pierre or Yarmouth, both places. I think, and that was in turn carried down by the Isabel H, which seemed to be the larger of the two vessels, and the Pronto. 956

The evidence may show you three successful trips to Keansburg, and on the fourth she was run down by a Coast Guard boat and she was towed to some point on the Sound and there had to be patched up, and there is evidence money was sent up there for the operation. You may remember the evidence is it was paid to someone at the request of the captain of the vessel.

For instance, Kleb was up in Yarmouth and money was sent to him. The purpose of that was that it was for the purchase price of the liquor that subsequently came in. Finally the Isabel H had 2400 cases on board and eight or nine hundred were towed down and Geiger said he sent instructions where to put them, and they were picked up, eight hundred of them, off South Carolina. The Isabel H went to Bermuda, where she was watched by the Coast Guard, but she finally got out and came up and transferred to the Southern Sword, through Callahan, who it is said owned the boat; and got rid of Pendleton and employed Brown, who went to Winter Quarter Light and by a system of light signals the Isabel H. Attracted her attention and the two of them made 957

*Charge of the Court.*

958 fast; that Brown spoke to her master and Velez recognized the people aboard the Isabel H, in fact went aboard and spoke to them, and the Isabel H came alongside; that from there the Southern Sword went to Pier 72, North River, her ordinary run being from Bridgeport to Norfolk, and that when she arrived at the pier there were no lights and no men, when it first arrived, but thereafter 20 longshoremen came and took off the alcohol from the Southern Sword and that the Southern Sword thereafter went to Bridgeport. It was then testified that Captain Pendleton had been restored to command, and there you have the end of the whole business.

959 To find these men guilty under the third count, you must find they knowingly and wilfully entered into this conspiracy.

The culmination, of course, was to bring the 1600 cases in by the Southern Sword, and you have to find they knowingly made this part and parcel of the scheme to have that operation effected.

Any statement made after the termination of the conspiracy, which I would say was after they left the restaurant, and they were brought to Mr. William Dunigan's office, and it might be a question of fact whether the conspiracy did end there, but I would say the statements made bound only the persons who made them. I recall now it was 960 Captain Brown, and you must not determine the guilt of any of the defendants other than Captain Brown on that point.

The evidence about Hoffman being at Freeport—the evidence isn't clear—however, at the time that transpired Hoffman is said to have offered Lancaster money to buy gasoline for one of the trucks at Freeport that was bringing in intoxicating liquor from these boats. If that was in 1934, of course it doesn't imply Hoffman's guilt on this, that is, it attempts to show intent and understanding of Hoffman, but that is the only way to consider it. It has no other value at all.

*Charge of the Court.*

The same thing as to Kleb's testimony about the Monololo. That is not evidence of guilt under this indictment, but to show that the man knew what he was doing on these occasions. From that effort, that understandnig, you can find intent in his subsequent conduct.

There is one thing more I want to talk to you about in the way of evidence, the two envelopes found in the flush tank of the men's room at the restaurant. The evidence as to Gottfried and Nardone is that they are the two men who went in there. That is all the evidence of that. There was also evidence that under LeVeque's chair there was a receipt found of money sent to Bermuda while the Isabel H was there, and LeVeque is charged with being a conspirator with these men. You may determine from which of the two men or whether from both of the two men they came. You may find whether the envelopes came from either or both of them. That is the reason we have trials by juries. You are required to listen to the evidence and then determine from whom those envelopes came, whether from Nardone or Gottfried, or both. There is a great deal that may be spelled out as to their understanding with each other and as to the Winter Quarter Lightship. If you find that paper came from Gottfried you can conclude that he knew all about the Southern Sword; that he was interested in it as a conspirator, that is, in connection with all the other evidence. I am not instructing you to find any of the defendants guilty on any of the evidence. You must construe the evidence and determine what weight you will give to it.

One of the cards found in the envelopes contained a legend that has been identified to be in Callahan's writing. You may compare it yourself with the two specimens that have been admitted as samples of his handwriting. If I saw you write I could always testify in court that I know your handwriting, and you can see yourselves that is not particularly convincing testimony. That makes it admissible. To determine the weight of it is your job. And then you may ob-

*Charge of the Court.*

964 serve the two names signed to it and determine whether or not the two correspond and then if you determine that came from Gottfried you may assume there was some connection between Callahan and Gottfried. In accordance with my earlier instructions this might be circumstantial evidence against Callahan, and you may conclude, if you wish, that Gottfried was knowingly engaged in assisting him in the importation of the 1600 cases of alcohol.

All of these defendants go to trial with the presumption of innocence, and that remains with them until you are convinced beyond a reasonable doubt that they are guilty.

965 Their guilt must be determined from the evidence beyond a reasonable doubt. A reasonable doubt is a doubt for which you can give a reason, the kind of doubt which motivates you in acting or refraining from acting in your usual walks of life.

You are the sole judges of the credibility of witnesses. You judge their credibility just as you do in the ordinary ways of life, that is, when a man is talking to you, does he look you in the face, does he bring conviction or leave a doubt, just the ordinary way of judging one who testifies.

966 The testimony of an accomplice does not invalidate the testimony. It is, however, scrutinized more than the testimony of a man who has nothing to do with it, more than the ordinary scrutiny that you may exercise in determining the truth of testimony. The weight of his testimony or his credibility you may determine.

The defendants do not have to testify and you are to draw no conclusions from the fact they did not do so. They do not have to testify. They had a right to sit there and make the Government prove their guilt beyond a reasonable doubt.

All the rulings I have made during the trial are matters of law and do not reflect any opinion I may or may not have. You may find the defendants guilty or not guilty on any or all of each of the three counts.

*Requests to Charge.*

Mr. Cahill, haven't I covered all of your requests?

967

Mr. Cahill: No. 3, I think, was not.

The Court: I think all of yours are in that I allow.

Mr. Cahill: I take an exception to any that have not been charged.

Mr. Climenko: May I respectfully request your Honor to instruct the jury that with respect to the testimony of Lancaster and Geiger in which they purport to quote LeVeque, with respect to the relationship between LeVeque and Hoffman, that that is not competent proof of the entrance into the conspiracy alleged in the third count of the indictment?

The Court: I won't change that. That would require a review of my charge, and I will let it stand as I gave it.

968

Mr. Climenko: I respectfully except.

With respect to some statements made by Mr. Dunigan in his summation, I have the following request: Mr. Dunigan stated in his summation that the Mohololo incident is part and parcel of this case, and in that connection I respectfully request your Honor to instruct the jury that that statement is unfounded and has no value as proof in this case.

The Court: Denied. I have already instructed them specially about the Monololo. I am sure I did. The Monololo was in operation by Kleb. Kleb was alleged to be a conspirator in this case, and that was introduced to show Kleb's knowledge and intent prior to the beginning of this conspiracy. It is not evidence of the going in of any other conspirator.

969

Mr. Dunigan: It was prior to the first day.

The Court: Yes.

Mr. Climenko: The witness was not able to say what day.

The Court: Is that the Monololo that Hoffman was in?

Mr. Dunigan: Yes.

The Court: Then I covered that in my charge.

Mr. Climenko: Exception.



*Requests to Charge.*

970 If your Honor please, at the conclusion of his summation Mr. Dunigan said in substance, and I cannot hope to quote it, that if the jury decides to acquit the defendants they must by the same token demonstrate their disbelief of the Government witnesses. I respectfully request your Honor to instruct the jury to disregard that statement which was in contravention of two fundamental principles of law which I need not quote.

The Court: If you find anything different in that statement from the burden of proof, beyond a reasonable doubt, and the right of the defendants to sit down and make the Government prove its case, you may disregard that.

971 Mr. Climenko: I have other requests, that statements and acts of a co-conspirator are binding on the others only if the jury first finds that there was a conspiracy to which these defendants were parties.

The Court: I so charge.

Mr. Climenko: Your Honor made a statement in your instructions to the effect that there is direct evidence to prove all the overt acts alleged in the indictment. On behalf of the defendant Hoffman I respectfully except to that statement, and in view of the fact that that was expressed, I respectfully request your Honor to instruct the jury that the mere proof of overt acts, any or all of them, does not in itself constitute proof of the commission of a conspiracy by any of the defendants.

972 The Court: I defined a conspiracy as an agreement to commit a crime, a combination by two or more persons by concerted action to accomplish an illegal end or even if the end was not criminal or illegal to do it by illegal means. There was direct evidence to sustain every one of them, with the exception of the conversation between Mathiasen and Gottfried, and I repeat that nothing that I say is evidence. I have charged you and I repeat that this case is entirely yours, it is out of my hands. I have only to give you the law.

*Requests to Charge.*

Mr. Climenko: The proof of the overt act would not constitute conspiracy in and of itself. 97

The Court: I will not change my charge on that.

Mr. Climenko: Exception.

Mr. Nolan: With respect to Captain Brown, in the course of describing what the conspiracy was, I think your Honor made an error as to Captain Brown, and he has requested me to call it to your attention, that after the Southern Sword had gone to Bridgeport, Brown came back and had a talk with Baife.

The Court: I do not recall anything I said to injure Captain Brown if it is not within your recollection. Gentlemen, these attorneys are doing a necessary duty and they would be violating their duty if they did not do this. 97

Mr. Cahill: In the case of Nos. 5 and 6, presenting again the question of whether there is any evidence to go to the jury on those two counts—it was called to their attention before in the form of a motion, and I won't go over it again.

The Court: If you find there was not the one conspiracy alleged in the third count but several independent conspiracies, you must acquit the defendants. I thought it was perfectly clear the Government was prosecuting these men in the form that I described and which is set forth in the indictment, and I will let you take that to the juryroom; that is, the conspiracy you must find the defendants guilty or not guilty of, otherwise I deny your motion, Mr. Cahill. 97

Mr. Cahill: I won't stop to analyze it critically, but otherwise I except to the charge other than that requested. No. 15?

The Court: I have given that about twice.

Mr. Cahill: Possibly you have. If it has not been given specifically, I except to that also. No. 16?

The Court: I will deny that.

Mr. Cahill: Exception for all defendants.

*Verdict.*

976 The Court: I am sure that I have told you that once you find any one of these defendants in possession of the alcohol after it had been wrongfully imported into this country, that is sufficient evidence under this statute to find anyone so in possession or aiding or abetting in the possession guilty under the first or second counts. I have explained that to you. That follows the statement that LeVeque sold the liquor.

Mr. Cahill: On behalf of the defendants, all of them, I except to the instruction just given or the repetition of it.

977 The Court: The United States Attorney called my attention to that. There is no explanation, or admission of possession. You will have to find possession. If you do so find after the introduction or smuggling into the country you may find them guilty under the first or second counts.

Mr. Climenko: I have a further exception. I desire to enter an exception to the entire charge upon the ground that preponderantly it has been a demonstration of the circumstances justifying conviction rather than acquittal. That is entered for all defendants.

(The jury retired at 3:50 P. M.)

(The jury returned to the courtroom at 5:05 P. M., when the following proceedings were had:)

978 The Court: Where is Mr. Halle?

Mr. Cahill: Mr. Halle had to leave, but we will take care of it.

(The roll of the jurors was called.)

The Clerk: Madam Forelady, have you agreed upon a verdict?

The Forelady: We have.

The Clerk: How say you?

The Forelady: We find the defendants guilty on Counts 1, 2 and 3.

*Motion to Set Aside Verdict.*

The Clerk: Please listen to your verdict as it stands recorded. You say you find the defendants Frank Carmine Nardone, Austin E. Callahan, Hugh Brown, Robert Gottfried and Nathan W. Hoffman guilty on all three counts of the indictment, and so say you all? 979

The Forelady: Yes.

Mr. Cahill: If the Court please, we wish to prepare somewhat more carefully than can be done on the spur of the moment, the motions to set aside the verdict, and for that reason we ask that sentence be deferred until such time as the Court may deem convenient and we ask that bail be continued until such time.

The Court: You do not wish to make motions now? 980

Mr. Cahill: It may save time if we present them in the way we suggest. We may make motions in arrest of judgment.

The Court: I will sentence Captain Brown now, but if you want time to make motions I do not think I will put them on bail.

Mr. Dunigan: As a matter of policy I think the facts in this case justify us in opposing bail.

(Defendant Erickson continued on bail.)

The Court: Do you wish me to sentence you now?

Defendant Brown: Yes, your Honor.

Mr. Nolan: In view of the fact that he has served 14 months I would move that the verdict of the jury be set aside. 981

The Court: That motion is denied.

Mr. Nolan: Exception.

(Discussion off the record.)

(Defendants remanded and sentence set for March 24, 1939, at 2:10 P. M.)

*Sentence.*

New York, March 24, 1939; 2:10 P. M.

## TRIAL RESUMED.

982 Mr. Cahill: If your Honor please, we move for an arrest of judgment and to set aside the verdict on the ground of the insufficiency of the indictment; on the ground that the defendants were not allowed additional challenges as requested.

The Court: What additional challenges?

983 Mr. Cahill: After we had exhausted our ten challenges we stated that since the charge was more than one crime we asked for an additional ten challenges and took an exception when that was denied.

Evidence received was in violation of the Federal Communication Act, and on all exceptions taken during the trial; that the verdict was against the evidence and contrary to law. We move on these grounds for an arrest of judgment and to set aside the verdict.

The Court: Motions denied.

Exception to all defendants.

Mr. Halle: Does your Honor want to hear argument on the motions with reference to Robert Gottfried on the evidence in this case?

The Court: No.

984 Any more motions?

Mr. Dunigan: The Government moves for sentence as to all defendants with the exception of Bert Erickson. In his case I suggest that the sentence be adjourned to two weeks from today and the bail be continued.

The Court: All right.

Mr. Dunigan: Your Honor knows the facts. I do not know that there is anything additional I have to say.

The Court: Take up the defendants, one at a time; what about Nardone?

Mr. Dunigan: With respect to the defendant Nardone the Government recommends that he be imprisoned for a period of four years and required to pay a fine of \$3,000, the fine on the third count.



*Sentence.*

The Court: Even if they were case hardened, and I do not know whether they are or not, some consideration should be given. I will give him two years. 985

Mr. Dunigan: With respect to Mr. Callahan, the Government recommends 18 months and \$1,000 fine.

The Court: A year and a day for Callahan. I will consider Callahan's case over the weekend.

Mr. Dunigan: With respect to the defendant Hoffman, I understand he is married. Outside of that I am in possession of no other information. The Government recommends two and a half years and \$2,500 fine.

The Court: I will give him two years and \$2,500 fine.

Mr. Dunigan: With respect to Gottfried, I know very little of his background except what is revealed in his case. The Government recommends a year and a day. 986

The Court: I will impose a sentence of a year and a day on him.

Mr. Dunigan: With respect to Captain Brown, all I know about him, except that he is a captain and apparently has been a seaman all his life, is that his part in this matter is in part due to his superior, Callahan. I have every reason to believe, although it is not definitely shown, that what he did in this matter is because he wanted him to do it. I feel that he has been punished sufficiently. I recommend a year's sentence and that it be suspended. 987

The Court: I will give Captain Brown three months, suspend sentence and put him on probation.

Mr. Halle: We ask the Court to fix bail pending appeal and to have the defendants released on bail. This motion is made on behalf of all defendants except Brown.

The Court: Motion denied.

Mr. Halle: Exception.

### Exhibits.

All of the Government's and defendants' exhibits admitted in evidence at the trial of this case will not be printed pursuant to stipulation, but are to be submitted either in their original form or in the form of copies as part of the Bill of Exceptions on the argument of the appeal.

### Judgment.

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, held at the United States Court House, in the Borough of Manhattan, City of New York on

Present:

The Honorable JOHN W. CLANCY,

Judge.

THE UNITED STATES OF AMERICA,

against

FRANK CARMINE NARDONE,  
alias FRANK CARMINE.

C. 103/24 Title 19, Sec. 1593a  
and b. Title 18, Sec. 550  
USC.

U. S. Criminal Code  
Section 88, Title 18 USC.

Unlawfully smuggling and  
clandestine introduction into  
U. S. without making entry at  
U. S. Custom House certain  
merchandise etc., contrary to  
law and conspiracy.

On motion of the United States Attorney, Ordered Sentence

It is thereupon ordered and adjudged that the above named defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a penitentiary for and during the term and period of Two years on counts 1-2-3 to run concurrently with each other and fined \$3,000 on count 3, and to stand committed until such fine on ct. 3 shall be paid or until he shall be otherwise discharged by due course of law.

JOHN W. CLANCY,  
United States District Judge.

**Commitment.**

IN THE DISTRICT COURT OF THE UNITED STATES 991  
OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

The President of the United States of America

To the Marshal of the United States for the Southern  
District of New York

and to

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WHEREAS the foregoing judgment and sentence was pro-  
nounced against the defendant named therein

992

AND, WHEREAS the Attorney General of the United States  
has designated the above named institution as the place of  
confinement where the said sentence shall be served.

NOW THIS IS TO COMMAND YOU, THE SAID MARSHAL forth-  
with to take and safely transport to said institution and  
there deliver to the officer in charge thereof the aforesaid  
defendant together with a copy of this writ; and you  
the officer in charge of said institution to receive, keep and  
imprison said defendant in accordance with said sentence,  
or until said defendant shall be otherwise discharged by  
due course of law. If said prisoner shall have been com-  
mitted to a jail or other place of detention to await trans-  
portation to the place at which said sentence is to be served,  
said sentence shall pursuant to law begin on the date on  
which said defendant was received at such jail or other  
place of detention.

993

Witness, The Honorable JOHN W. CLANCY,  
Judge of said Court, and the seal there-  
of affixed at New York City in said  
District this 24th day of March, 1939.

CHARLES WEISER,  
Clerk.

**Judgment.**

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, held at the United States Court House, in the Borough of Manhattan, City of New York on March 24, 1939.

Present:

The HONORABLE JOHN W. CLANCY,

*Judge,*

THE UNITED STATES OF AMERICA,

*vs.*

ROBERT GOTTFRIED, alias ROBERT GODFREY, alias ROBBIE.

C. 103/24 Title 18, Sec. 550 and Title 19, Sec. 1593a and b USC.

U. S. Criminal Code Section 88, Title 18 USC. Unlawfully smuggling and clandestine introduction into U. S. without making entry at U. S. Custom House certain merchandise etc., contrary to law and conspiracy.

On motion of the United States Attorney, Ordered Sentence

IT IS THEREUPON, ORDERED AND ADJUDGED that the above named defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a penitentiary for and during the term and period of One Year and One Day on each of Counts 1-2-3 to run concurrently with each other.

JOHN W. CLANCY,  
*United States District Judge.*

**Commitment.****IN THE DISTRICT COURT OF THE UNITED STATES  
OF AMERICA**

997

**SOUTHERN DISTRICT OF NEW YORK.***The President of the United States of America;**to the Marshal of the United States for the Southern  
District of New York**and to**of the**at*

WHEREAS the foregoing judgment and sentence was pronounced against the defendant named therein

998

AND, WHEREAS the Attorney General of the United States has designated the above named institution as the place of confinement where the said sentence shall be served.

NOW THIS IS TO COMMAND YOU, THE SAID MARSHAL forthwith to take and safely transport to said institution and there deliver to the officer in charge thereof the aforesaid defendant together with a copy of this writ; and you the officer in charge of said institution to receive, keep and imprison said defendant in accordance with said sentence, or until said defendant shall be otherwise discharged by due course of law. If said prisoner shall have been committed to a jail or other place of detention to await transportation to the place at which said sentence is to be served, said sentence shall pursuant to law begin on the date on which said defendant was received at such jail or other place of detention.

999

WITNESS, the Honorable John W. Clancy,  
Judge of said Court, and the seal thereof  
affixed at New York City in said  
District this 24th day of March, 1939.

CHARLES WEISER,  
Clerk.



**Judgment.**

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, held at the United States Court House, in the Borough of Manhattan, City of New York on March 24, 1939.

Present:

The HONORABLE JOHN W. CLANCY,

*Judge.*

THE UNITED STATES OF AMERICA,

vs.

NATHAN W. HOFFMAN,  
alias NAT.

C. 103/24 Title 19, Sec. 1593a  
and b, Title 18, Sec. 550  
USC.

U. S. Criminal Code  
Section 88, Title 18 USC.  
Unlawfully smuggling and  
clandestine introduction into  
U. S. without making entry at  
U. S. Custom House certain  
merchandise etc., contrary to  
law and conspiracy.

On motion of the United States Attorney, Ordered  
Sentence.

IT IS THEREUPON ORDERED AND ADJUDGED that the above named defendant be committed to the custody of the Attorney General of the United States, or his authorized representative for imprisonment in a penitentiary for and during the term and period of Two Years on each of Counts 1-2-3 to run concurrently with each other and fined \$2500. on Count 3, and to stand committed until such fine on et. 3 shall be paid or until he shall be otherwise discharged by due course of law.

JOHN W. CLANCY,

*United States District Judge.*

**Commitment.****IN THE DISTRICT COURT OF THE UNITED STATES  
OF AMERICA**

1003

**SOUTHERN DISTRICT OF NEW YORK.***The President of the United States of America;**to the Marshal of the United States for the Southern  
District of New York**and to                      of the                      at*

WHEREAS the foregoing judgment and sentence was pronounced against the defendant named therein

1004

AND, WHEREAS the Attorney General of the United States has designated the above named institution as the place of confinement where the said sentence shall be served.

NOW THIS IS TO COMMAND YOU, THE SAID MARSHAL forthwith to take and safely transport to said institution and there deliver to the officer in charge thereof the aforesaid defendant together with a copy of this writ; and you the officer in charge of said institution to receive, keep and imprison said defendant in accordance with said sentence, or until said defendant shall be otherwise discharged by due course of law. If said prisoner shall have been committed to a jail or other place of detention to await transportation to the place at which said sentence is to be served, said sentence shall pursuant to law begin on the date on which said defendant was received at such jail or other place of detention.

1005

WITNESS, the Honorable John W. Clancy,  
Judge of said Court, and the seal there-  
of affixed at New York City in said  
District this 24th day of March, 1939.

CHARLES WEISER,  
Clerk.

**Extension of Time.**

The time of appellants to settle and file their bill of exceptions was duly extended by appropriate order to July 10th, 1939, and the bill of exceptions is being settled and filed within the time extended.

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**End of Bill of Exceptions.**

Inasmuch as the foregoing is not a part of the record, this bill of exceptions is tendered by the defendants-appellants, FRANK CARMINE NARDONE, NATHAN W. HOFFMAN and ROBERT GOTTFRIED, to be made part of the record of this cause.

**Stipulation as to Bill of Exceptions.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

FRANK CARMINE NARDONE,  
NATHAN W. HOFFMAN, ROB-  
ERT GOTTFRIED, *et al.*,  
Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the foregoing Bill of Exceptions is correct in every particular and that with the exhibits all of which are made part of the Bill of Exceptions and which are being submitted to the Circuit Court of Appeals on the argument either in their original form or in the form of printed or photostatic copies, it contains all the evidence in this cause, and that it may be duly signed, settled and allowed.

Dated: New York, N. Y., July , 1939.

JOHN T. CAHILL,  
United States Attorney.

DAVID V. CAHILL,  
Attorney for Defendant, Frank  
Carmine Nardone.

JESSE CLIMENKO,  
Attorney for Defendant, Nathan  
W. Hoffman.

LOUIS HALLE,  
Attorney for Defendant,  
Robert Gottfried.

**Certificate and Order Settling Bill of Exceptions.**

1012

THIS IS TO CERTIFY that the foregoing Bill of Exceptions tendered by the appellants, is correct in every particular and that with the exhibits which are to be submitted to the Circuit Court of Appeals on the argument, either in their original form or the form of printed or photostatic copies, it contains all of the evidence in this cause and the said exhibits are hereby made part of this Bill of Exceptions and the said Bill of Exceptions is hereby settled and allowed and made part of this cause.

Dated, New York, July , 1939.

1013

JOHN W. CLANCY,  
*United States District Judge.*

1014



**Notice of Appeal.**

**UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

**UNITED STATES OF AMERICA,**  
**Appellee,**  
**against**

**FRANK CARMINE NARDONE,**  
**NATHAN W. HOFFMAN, AUSTIN**  
**L. CALLAHAN, HUGH BROWN**  
**and ROBERT GOTTFRIED,**  
**Defendants-Appellants.**

**Name and Address of Appellants:**

**NATHAN W. HOFFMAN, 1254 Union Street, Borough of  
Brooklyn, County of Kings, City and State of New  
York.**

**ROBERT GOTTFRIED, Hotel Breslin, Borough of Man-  
hattan, County, City and State of New York.**

**FRANK CARMINE NARDONE, 121 W. 44th Street, Bayonne,  
N. J.**

**Name and Address of Appellants' Attorneys:**

**WEGMAN & CLIMENKO, Sixty Wall Street, New York  
City, attorneys for Appellant Hoffman.**

**LOUIS HALLE, Sixty Wall Street, New York City, attor-  
ney for Appellant Gottfried.**

**DAVID V. CAHILL, Eleven Broadway, New York City,  
attorney for Appellant Nardone.**

*Notice of Appeal.*

1018

**OFFENSE.**

The Appellants NATHAN W. HOFFMAN, ROBERT GOTTFRIED, FRANK CARMIN NARDONE were convicted of a violation of the following statutes:-

1. Unlawfully, wilfully and knowingly defraud the revenue of the United States by smuggling and clandestinely introducing into the United States in violation of law a quantity of alcohol, in violation of U.S.C. Title 19, Section 1593 a; and U.S.C. Title 18, Section 550.

1019

2. Unlawfully, wilfully, knowingly and fraudulently receiving, concealing and facilitating the transportation of alcohol brought into the United States contrary to law in violation of U.S.C. Title 19, Section 1593 b; and U.S.C. Title 18, Section 550.

3. Conspiracy to commit divers offenses against the United States, to wit: to violate the provisions of the Tariff Act of 1930, more specifically, Title 19, Section 1593-a and 1593-b.

Date of Judgment: March 24, 1939.

1020

**DESCRIPTION OF JUDGMENT OR SENTENCE.**

The appellants NATHAN W. HOFFMAN and ROBERT GOTTFRIED, FRANK CARMIN NARDONE were convicted by a verdict of the jury on the following counts of the indictment:

Count 1: Unlawfully, wilfully and knowingly defrauding the revenue of the United States by smuggling and clandestinely introducing into the United States in violation of law a quantity of alcohol in violation of U.S.C. Title 19, Section 1593-a; and Title 18, U.S.C., Section 550.

*Notice of Appeal.*

Count 2: Unlawfully, wilfully, knowingly and fraudulently receiving, concealing and facilitating the transportation of alcohol brought into the United States contrary to law in violation of U.S.C. Title 19, Section 1593-b; and U.S.C. Title 18, Section 550. 1021

Count 3: Conspiracy to commit divers offenses against the United States, to wit: to violate the provisions of the Tariff Act of 1930, more specifically, Title 19, Sections 1593-a and 1593-b.

## SENTENCE.

1022

The Appellant Hoffman was sentenced as follows:

Count 1: 2 years—To run concurrently.

Count 2: 2 years—To run concurrently.

Count 3: 2 years, plus a fine of \$2500.—To run concurrently.

The Appellant Gottfried was sentenced as follows:

Count 1: 1 year and a day—To run concurrently.

Count 2: 1 year and a day—To run concurrently.

Count 3: 1 year and a day—To run concurrently. 1023

The Appellant Nardone was sentenced as follows:

Count 1: 2 years—To run concurrently.

Count 2: 2 years—To run concurrently.

Count 3: 2 years, plus a fine of \$3000.—To run concurrently.

*Grounds of Appeal.*

1024

**PLACE OF CONFINEMENT.**

The Appellants are presently confined in the Federal House of Detention at West and 11th Streets, Borough of Manhattan, City of New York. Sentence to be executed in a penitentiary or prison camp.

We, the undersigned, the Appellants above named, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above mentioned on the grounds set forth below:

Dated: March 24, 1939.

1025

NATHAN W. HOFFMAN,  
Appellant.

ROBERT GOTTFRIED,  
Appellant.

FRANK CARMINE NARDONE,  
Appellant.

**Grounds of Appeal.**

1026

1. The Court erred in refusing to dismiss Count 3 of the indictment upon the ground that the allegations set forth therein were also made the basis of a similar charge in the United States District Court for the Eastern District of South Carolina and an indictment found in the said latter Court on said allegations and acts, upon the ground that the indictment in the District Court in South Carolina was proceeded upon by the UNITED STATES OF AMERICA to a final conclusion.

*Grounds of Appeal.*

2. The Court erred in refusing to dismiss Count 3 of the indictment upon the ground that the same set forth more than one conspiracy and was duplicitous. 1027

3. The Court erred in allowing into the evidence as to each of the three counts of the indictment testimony of witnesses concerning statements made in the presence of the defendants HOFFMAN, GOTTFRIED, NARDONE, as to the matters wholly unrelated to the charges set forth in counts 1, 2 and 3 of the indictment.

4. The Court erred in refusing to strike out the motions made regarding such testimony and in refusing to direct the jury to disregard such testimony. 1028

5. The Court erred in refusing to declare a mistrial at the respective times when such motions were made during the progress of the trial.

6. The Court erred in receiving into evidence testimony of witnesses concerning the matters comprising charges set forth in Counts 1, 2 and 3 of the indictment upon the ground that such evidence was illegally obtained in that the said evidence was obtained as a result of knowledge gained by illegally tapping the telephone wires and listening in over such wires by Government agents without the consent of the defendants. 1029

7. The Court erred in allowing testimony of the defendants' alleged participation in the acts set forth in Counts 1, 2 and 3 of the indictment upon the ground that in the collateral inquiry made during the trial as to the source of the information received by the Government agents of the defendants' alleged acts, it appeared, in so far as the defendants were permitted to proceed with such collateral inquiry,



*Grounds of Appeal.*

030<sup>3</sup> that the evidence of the witnesses upon the trial was obtained as a result of the interception of the telephone conversations and not as a result of any independent source.

9. The Court erred in its charge to the jury in that the said charge was preponderantly a demonstration to the jury of the circumstances under which a conviction would be justified, and in that too little, if any, of the substance of that charge was devoted to the circumstances under which the jury would be justified in acquitting the defendants.

031 10. The Court erred in refusing to instruct the jury as requested by counsel for the defendants that the statement made by the prosecuting attorney in his summation to the effect that an acquittal would be tantamount to a repudiation of the credibility of the Government's witnesses, as in substance an erroneous statement which the jury should have been directed to disregard as requested for the reason that the statement as made was in obvious conflict with the fundamental principle that the defendants were presumed to be innocent until found guilty beyond a reasonable doubt, and for the further reason, that it was in violation of the principle that no inferences could be drawn from the failure of the defendants to testify or to adduce any testimony from  
032 any witnesses.

11. The Court erred in failing to refuse to charge the jury as requested that the acts and statements of alleged co-conspirators would be binding upon the defendants only in the event that the jury first found that the defendants were parties to the conspiracy alleged in the indictment.

12. The Court erred in refusing to charge the jury as requested on behalf of the defendants that the incident with respect to the boat, the *MOSALOLA*, as testified to by the

*Grounds of Appeal.*

witness, LANCASTER, which said incident, in accordance with the testimony of that defendant, could not be established as within the terminal dates set forth in the third count of the indictment, should not be accepted as proof of the allegations of that count. 10

13. The Court erred in refusing to grant the motion to dismiss the indictment at the close of the Government's case.

14. The Court erred in refusing to grant the motion to dismiss the indictment at the close of the entire case.

15. The Court erred in not granting the motion to set aside the verdict as being against the weight of evidence. 10

10

**Order Extending Time Within Which to Settle and File  
Bill of Exceptions and Assignment of Errors.**

At a stated term of the United States District Court held in and for the Southern District of New York at the United States Courthouse, located at Foley Square, in the Borough of Manhattan, City and State of New York, on the 21st day of April, 1939.

Present:

HON. JOHN W. CLANCY,  
*U. S. District Judge.*

UNITED STATES OF AMERICA,  
Appellee,

against

FRANK CARMINE NARDONE,  
NATHAN W. HOFFMAN, AUSTIN  
L. CALLAHAN, HUGH BROWN  
and ROBERT GOTTFRIED,  
Defendants-Appellants.

c 103-24

Upon the annexed affidavit of PHILIP F. HALLE, duly verified the 20th day of April, 1939, and the stipulation of consent, dated the 20th day of April, 1939, and upon all the proceedings had herein, it is hereby

ORDERED, that the time of the defendants-appellants to serve and file their record on appeal, bill of exceptions, assignments of errors and term of this court, be and the same is hereby extended up to and including the 10th day of July, 1939.

JOHN W. CLANCY,  
*U. S. D. J.*

# **Stipulation as to Exhibits.**

**UNITED STATES CIRCUIT COURT OF APPEALS,  
FOR THE SECOND CIRCUIT.**

1039

**UNITED STATES OF AMERICA**

**against**

**FRANK CARMINE NARDONE,  
NATHAN W. HOFFMAN, ROBERT  
GOTTFRIED,  
Defendants-Appellants.**

1040

IT IS HEREBY STIPULATED AND AGREED that the exhibits, being part of the Bill of Exceptions herein, because of their size and number, shall not be printed in the transcript of the record, but shall be submitted to the Court on the argument of this appeal in their original form or with printed or photostatic copies for the use of the Court.

Dated: New York, N. Y., June 12, 1939.

**JOHN T. CAHILL** by L.C.D.,  
United States Attorney for the Southern  
District of New York.

1041

**DAVID V. CAHILL,**  
Attorney for Defendant-Appellant,  
Frank Carmine Nardone.

**WEGMAN & CLIMENKO,**  
Attorneys for Defendant-Appellant,  
Nathan W. Hoffman.

**LOUIS HALLE,**  
Attorney for Defendant-Appellant,  
Robert Gottfried.

**SO ORDERED:**

**LEARNED HAND,**  
**U. S. C. J.**

**Assignment of Errors.**

1042

**UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

**UNITED STATES OF AMERICA**

**against**

**FRANK CARMINE NARDONE,  
NATHAN W. HOFFMAN and  
ROBERT GOTTFRIED,**

1043

**Defendants-Appellants.**

The defendants-appellants, Frank Carmine Nardone, Nathan W. Hoffman and Robert Gottfried, hereby make the following-assignment of errors:

1044

1. The Court erred in overruling the objection of appellants to the statement made by counsel for the Government in the opening as follows: "Mr. McKnight: The Government will show that many of the names I have referred to were bootleggers and runrunners who have—" (p. 28) and in denying the motion of appellants for a mistrial because of the said remark.

2. The Court erred in denying the motion<sup>2</sup> of appellants made at the opening of the trial to dismiss the indictment.

3. The Court erred in denying the motion of appellants for a preliminary inquiry into the admissibility in evidence of the testimony of the witness Geiger offered by the Government, upon the ground that the evidence had been obtained by unlawful interceptions of telephone and telegraph messages in violation of the Federal Communications Act (pp. 21 and 22).



*Assignment of Errors.*

4. The Court erred in overruling the objection made on behalf of the appellants to the treatment of the witness, Kleb, as a hostile witness and to the permission granted the prosecutor to cross-examine him as such (p. 61). 104

5. The Court erred in denying the motion made on behalf of the appellants for a mistrial because of the admission of evidence relating to an alleged shooting at Keansburg, New Jersey, which was not connected in any way with the appellants (p. 65).

6. The Court erred in overruling the objection made on behalf of the appellants on the following question: "Q. How many times do you know that alcohol was brought into Keansburg?" (p. 28). 104

7. The Court erred in receiving in evidence the Government's Exhibits 16 to ~~26~~ inclusive (p. 30).

8. The Court erred in overruling the objection made on behalf of the appellants to the following question: "Q. What was this \$1050 represented by Government's Exhibit 16 in evidence used for?" (p. 30).

9. The Court erred in overruling the objection made on behalf of the appellants to the following question: "Q. Was Captain Conrad on the Pronto at the time it appeared at Keansburg?" (p. 70). 104

10. The Court erred in overruling the objection made on behalf of the appellants to the following question: "Q. Do you know a man named Captain Lancaster?" (p. 76).

11. The Court erred in overruling the objection made on behalf of the appellants to the following question: "Q. What happened at Keansburg that night?" (p. 77).

*Assignment of Errors.*

48. 12. The Court erred in overruling the objection made on behalf of the appellants to the following question: "Q. What persons did you see other than Erickson?" (p. 80).

13. The Court erred in overruling the objection made on behalf of the appellants to the following question: "Q. And your reason for going to South Carolina was because of what happened at Keansburg, is that right?" (p. 33).

14. The Court erred in overruling the objection made on behalf of the appellants to the following question: "Q. What conversation did you have with Mr. Le Veque about South Carolina?" (p. 83).

15. The Court erred in overruling the motion made on behalf of the appellants to strike out the testimony of the witness Kleb and to instruct the jury to disregard that question (p. 94).

16. The Court erred in overruling the objection made on behalf of the appellants to the following question: "Q. What does Saturday, 11 A. M., Saturday, 7 P. M. mean?" (p. 88).

17. The Court erred in permitting the prosecutor to refer to a statement of the witness, Kleb, taken prior to the trial in the course of his cross-examination and to use that statement in cross-examining the witness (p. 90).

18. The Court erred in overruling the objection made on behalf of the appellants to the admission of evidence in relation to a list of alleged owners of the cargo of the vessel "Isabel H", referred to in the testimony of the witness, Murphy (p. 124).

*Assignment of Errors.*

19. The Court erred in denying the motion made on behalf of the appellants to strike out all the testimony of the witnesses, Murphy and Zoole (p. 137). 105

20. The Court erred in denying the motion made on behalf of the appellants to strike out the testimony of the witness Steinfeldt (p. 142).

21. The Court erred in failing to receive the proof offered on behalf of the appellants as to the inadmissibility of the evidence of the witness, McAdams (p. 152).

22. The Court erred in failing to receive the proof offered on behalf of the appellants as to the inadmissibility of the evidence of the witness Martin (p. 157). 105

23. The Court erred in sustaining the objection of counsel for the Government to the following question: "Q. Did they ever discuss with you the effect of a conviction of a crime on your license?" (p. 189).

24. The Court erred in sustaining the objection of counsel for the Government to the following question: "Q. How do you explain that?" (p. 86).

25. The Court erred in denying the motions made on behalf of the appellants to strike out the testimony of the witnesses Vallee and Moe (p. 240). 105

26. The Court erred in failing to grant a mistrial on a motion made on behalf of the appellants on the reception of evidence by the witness Micken to the effect that an unknown person used a gun and by that means interfered with an investigator of the Government in the performance of his duty (p. 249).

*Assignment of Errors.*

1054 27. The Court erred in declining to permit appellants to complete the examination of the witness Kozac and to call other witnesses on an inquiry on the inadmissibility of evidence given by various witnesses of the Government which was alleged to have been obtained by means of unlawful interceptions of telephone and telegraph messages to and from defendants and other persons (p. 289).

28. The Court erred in declining to permit one, Picarelli, to be called as a witness on behalf of the appellants as to the inadmissibility of testimony offered by the Government. (p. 289).

1055 29. The Court erred in denying the motion made on behalf of the appellants to strike and instruct the jury to disregard all of the evidence of the following witnesses: George Geiger, John J. Humphreys, John Pelletier, John Edward Pike, Mr. William Kleb, Miss Edelman, Miss Crowley, Miss Weiss, Mr. Lancaster, Mr. Parrot, Mr. Steinfeldt and Mr. Cooper, also Mr. Neilson, Mr. Strunfmel, Mr. McAdams, Mr. Dunn, Mr. Carr (p. 301).

1056 30. The Court erred in denying the motion made on behalf of the appellants to strike the testimony of the witness Pike as to the steamship Pronto and as to other matters (p. 302).

31. The Court erred in denying the motion made on behalf of the appellants to strike Exhibit 32 (p. 302).

*Assignment of Errors.*

32. The Court erred in denying the motion made on behalf of the appellants to strike the testimony of the witness Kleb relating to the steamship Monololo (p. 302).

33. The Court erred in denying the motion made on behalf of the appellants to strike the testimony of the witness Lancaster relating to alleged incidents in December, 1934, and January, 1935, prior to the period included within the indictment (p. 303).

34. The Court erred in denying the motion made at the close of the Government's case to dismiss the indictment on the ground that the Government had failed to prove the crimes alleged therein (p. 304).

35. The Court erred in denying the motions to dismiss the indictment made at the close of the entire case (p. 309).

36. The Court erred in overruling the objection made on behalf of the appellants to remark made by counsel for the Government in his summation to the effect that the jury should convict the defendants in this case because the testimony stands uncontradicted in this case (p. 309).

37. The Court erred in overruling the objection made on behalf of the appellants to the remark made by counsel for the Government that the shooting incident was admissible against any conspirator whether he was in the conspiracy at that time or not (p. 309).

38. The Court erred in declining to instruct the jury as requested by appellants that the jury could not base a verdict of guilty on evidence tending to show the commission of any other offense than that charged in the indictment.



*Assignment of Errors.*

1060 39. The Court erred in declining to instruct the jury as requested by appellants that evidence of smuggling by persons other than the defendants was not to be considered in determining the guilt or innocence of the defendants unless it was shown that the other persons were acting for or in concert with the defendants.

40. The Court erred in declining to instruct the jury as requested by appellants that there was no evidence that the defendants or any of them concealed the alcohol referred to in the second count of the indictment or facilitated the concealment.

1061

41. The Court erred in refusing to instruct the jury that the statements of a Government witness allegedly relating a conversation held with an alleged conspirator in which the alleged conspirator referred to a defendant as being a party to the conspiracy was not competent and sufficient proof in itself of the participation by the accused defendant in the alleged conspiracy.

1062

42. The Court erred in declining to instruct the jury as requested by appellants that the jurors could not find a defendant guilty of the crime alleged in the indictment because they may form the opinion or reach the conclusion that the defendant has committed some other crime.

43. The Court erred in the whole tenor and content of its charge by reciting and emphasizing circumstances tending to demonstrate the guilt rather than the innocence of the defendants, and so stressing evidence unfavorable to the defendant as to lead the jury to a verdict against them.

44. The Court erred in denying the motion in arrest of judgment made on behalf of the appellant.

*Assignment of Errors.*

45. The Court erred in denying the motion to set aside the verdict. 1063

DAVID V. CAHILL,  
Attorney for Defendant-Appellant  
Frank Carmine Nardone.

JESSE CLIMENKO,  
Attorney for Defendant-Appellant  
Nathan W. Hoffman.

LOUIS HALLE,  
Attorney for Defendant-Appellant 1064  
Robert Gottfried.

1065

## Stipulation as to Record.

1066

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

FRANK CARMINE NARDONE,  
 NATHAN W. HOFFMAN, ROBERT  
 GOTTFRIED, *et al.*,  
 Defendants.

1067

IT IS HEREBY STIPULATED AND AGREED that the foregoing  
 is a true transcript of the record of the said District Court  
 in the above-entitled matter as agreed upon by the parties.

Dated: New York, N. Y., July , 1939.

JOHN T. CAHILL,  
 United States Attorney for the Southern  
 District of New York.

1068

DAVID V. CAHILL,  
 Attorney for Defendant-Appellant,  
 Frank Carmine Nardone.

JESSE CLIMENKO,  
 Attorney for Defendant, Nathan  
 W. Hoffman.

LOUIS HALLE,  
 Attorney for Defendant,  
 Robert Gottfried.

## Clerk's Certificate.

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

1069

UNITED STATES OF AMERICA

against

FRANK CARMINE NARDONE,  
NATHAN W. HOFFMAN, ROBERT  
GOTTFRIED, *et al.*,  
Defendants.

1070

I, CHARLES WEISER, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said District Court to be hereunto affixed at the City of New York, in the Southern District of New York, this day of July, 1939, in the year of our Lord, one thousand nine hundred and thirty-nine, and of the Independence of the said United States, the one hundred and sixty-third.

1071

[SEAL]

CHARLES WEISER,  
Clerk.

[fol. 358] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,  
against

FRANK CARMINE NARDONE, and Others, Appellants

Before L. Hand, Swan & Augustus N. Hand, Circuit Judges

Appeals from a judgment of the District Court for the Southern District of New York, convicting the appellants upon an indictment for smuggling and concealing alcohol, and for a conspiracy to do so.

David V. Cahill for Frank Carmine Nardone.

Jesse Climenko for Nathan Hoffman.

Louis Halle for Robert Gottfried.

Maxwell S. McKnight for appellee.

OPINION

L. HAND, Circuit Judge:

The accused appeal from a judgment convicting them under an indictment in three counts, two for smuggling and concealing alcohol, and a third for a conspiracy to do so. We affirmed an earlier conviction under the same indictment (*U. S. v. Nardone*, 90 Fed. (2) 630), but the Supreme Court reversed our judgment (*Nardone v. United States*, 302 U. S. 379) because of the admission of certain telephone "taps" which we thought competent, but they did not. Upon the present trial the same transactions were [fol. 359] proved by what, generally speaking, was the same evidence, omitting the "taps"; and the main question raised by these appeals is whether the judge improperly refused to allow the accused to examine the prosecution as to the uses to which it had put the information unlawfully gained; that is, as to what part of the evidence introduced was indirectly procured as a result of tapping the wires. We may refer to the statement of facts in our first opinion to show the general character of the crime charged and proved, and before discussing the main issue, we will take up some of the incidental objections raised. Nardone says that there was no evidence against him except the declarations of other parties to the venture, which did not become



competent until he had been independently connected. The principle is right, but its application is wrong. The prosecution directly proved that he was habitually in the company of those conspirators who were openly connected with the smuggling; and Geiger, a radio operator, swore that at the interview at which LeVeque, one of the conceded smugglers, was giving him his instructions, both Nardone and Hoffman were present; they would not have been, had they been merely disinterested observers. Another witness, McAdam, said that LeVeque introduced Nardone to him as his partner, and that the project was freely discussed before him. Apparently Nardone was one of the ringleaders. Gottfried also was repeatedly in the company of the smugglers at their customary places of meeting. His guilt was clearly enough shown by his effort to destroy incriminating papers at the time of his arrest. He went to a water-closet off the bar where the arrests took place, and threw into the flush-tank, among other papers, the business cards of one, [fol. 360] Mathiasen, and one Callahan. The reason for supposing that these came from Gottfried rather than from Nardone, who had earlier gone into the same water-closet, is that one, Mathiasen, swore that Gottfried had arranged with him to have Callahan, the owner of the Southern Sword, board that ship when she entered New York Harbor, loaded with alcohol on March 17, 1936, the date of the smuggling in the substantive counts. It is reasonable to conclude that these papers at least he tried to conceal, even if it was Nardone who threw away those relating to the places where the Isabelle H. and the Southern Sword were to meet in southern waters. Hoffman's connection was also sufficiently established. He had paid for the gasoline to run the trucks that took the alcohol from the Pronto in December 1934 or January 1935, and he too was repeatedly seen in the company of the others. He objects that the conspiracy was laid as commencing on January 2, 1935, and that it was not shown that he paid for the gasoline after it began. That is irrelevant; his earlier complicity might not have been enough, had it not been followed by his later association with the smugglers; but when that was proved, it was reasonable to infer that it was in continuation of the original course of dealing, which took its color from what had gone before. There was plainly enough to support a verdict against all these men—certainly as to the conspiracy.

Objection was taken to the admission of several bits of testimony other than that procured by the "taps". The prosecution was allowed to prove the landing at Keansburg, New Jersey, of some alcohol from the Pronto, which was interrupted by Treasury agents while it was in progress, and which developed into a shooting affray. This was al-[fol. 361] together competent as in execution of the conspiracy. Several of the principal smugglers had been present at the scene, and on the next day LeVeque was excitedly discussing it in the restaurant, where he had met several of the others, among them Nardone. The objection appears to be based upon the notion that the evidence was incompetent because it was likely to divert the jury's mind from the crime to one of its distracting incidents. That is often true, but is never a reason for refusing to admit anything that goes to prove the issues.

The next objection was to secondary testimony by a sailor, Murphy, of a paper purporting to be a list of the owners of the Isabelle H. which contained the name of Nardone. Murphy, who was one of the crew of that vessel, swore that the wireless operator on board showed it to him in answer to his request for the names of those who were to pay him. If this had been mere gossip between the two men, it would not have been admissible; the fact that one conspirator tells another something relevant to the conspiracy, does not alone make the declaration competent; the declaration must itself be an act in furtherance of the common object; mere conversation between conspirators is not that, any more than the declaration of an agent outside the scope of his duties. Here, however, the declaration of the wireless operator was probably a part of his duty; for he was employed to keep in touch with the owners ashore and advise them of any troubles that might arise. Ordinarily, it is true, only the master would be authorized to answer the sailor's question, but, considering the peculiar position of wireless operators on rum-runners, as Murphy swore to it, the situation was exceptional. The point is not free from [fol. 362] doubt, but in any case no great harm is done by the testimony, as Nardone was amply connected without it.

There is left only the question of the effect of the unlawful "taps". Did they taint all other evidence procured through them? *Watson v. United States*, 6 Fed. (2) 870, (C. C. A. 3). Did the burden rest upon the accused or the prosecution, to show to what the taint extended? *United*

States v. Kraus, 270 Fed. Rep. 578, 581. How should the inquiry be conducted? Was it too late to leave it until the trial? We do not think we need answer these questions because of the decision in *Olmstead v. United States*, 277 U. S. 438, which, so far as we can see, still stands. The doctrine of that case is that telephone tapping is not of itself an unlawful search under the Fourth Amendment. If it were, then perhaps not only the actual talk overheard would be incompetent, but any evidence obtained by means of it; the court did not say as to that. In any case the same consequence does not attend the acquisition of evidence by means of an ordinary crime; as to that, the common-law still prevails, and the court will not look beyond the character of the evidence itself. In *Nardone v. United States*, supra (302 U. S. 379) the Supreme Court decided only that the Federal Communications Act forbade divulging information derived from telephone "taps" in a court of law by government employees; all the discussion ranged upon whether the language of the act covered them. If it did, their testimony had been forbidden, and was of course incompetent; Congress had made it so. But Congress had not also made incompetent testimony which had become accessible by the use of unlawful "taps", for to divulge that information was not to divulge an intercepted telephone [fol. 363] talk. Indeed, the officer might look what he had heard in his breast, and yet use it effectively enough. He would of course be taking advantage of his crime, but that would not be enough; the testimony he secured would not itself be a forbidden disclosure. So understood, the two cases are consistent, and the accused at bar had no right to a discovery of how the prosecution's case was prepared.

On the other hand, if *Olmstead v. United States*, supra, should be treated as overruled, the convictions may well have to be reversed. There is no practical way in which an accused can avail himself of his privilege—if it extends beyond the telephone talk itself—than by a complete discovery of how the case against him has been prepared. In substance the judge stopped the inquiry, for it did not help to give leave to the accused, as he did, to examine as to any specific evidence they could point out. Evidence does not bear the ear-marks of its acquisition. One thing leads to another, and if the original taint pervades the last scrap of evidence eventually found, the accused will not get his rights short of a complete disclosure. We hesitate to as-

sume that so drastic a remedy follows upon a single misstep. If the inquiry must precede the trial, the prosecution will often be hopelessly handicapped by a complete exposure of its case in advance. On the other hand, if it is left to the conclusion of the testimony, a mistrial will be necessary unless it turns out that the prosecution has not used the "taps" at all, or so little as not to count. These embarrassments may well result in qualifying the doctrine that all evidence procured through any unlawful search is [fol. 364] incompetent; the incompetence may be limited to the very transaction—the document seized, the talk overheard. That, for example, is the doctrine as to confessions. *Wigmore* § 859. The Supreme Court has never committed itself on the point, for in all its decisions except *Silverthorne Lumber Company v. United States*, 251 U. S. 385, the very document or other evidence seized was offered; and in that case, although the unlawfully seized papers were not offered, the prosecution was proposing to compel their production.

From what we have said it is apparent that we think that the result here is doubtful. Possibly *Olmstead v. United States*, supra, is no longer law; if it is not, possibly the extreme form of the doctrine will prevail, even at the cost of those difficulties in the prosecution of crime which we have mentioned. Against this chance we think that the accused should be allowed bail, pending application for certiorari. When we denied bail originally, we had not had the chance to examine the record or to appreciate the doubts which have now appeared.

Judgment affirmed; appellants admitted to bail in case they apply for certiorari within ten days after this opinion is filed.

[fol. 365] IN UNITED STATES CIRCUIT COURT OF APPEALS,  
SECOND CIRCUIT

[Title omitted]

JUDGMENT—Filed July 28, 1939

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.



On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 365½] [File endorsement omitted.]

[fol. 366] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 367] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the question whether the trial court correctly disposed of petitioners' claim that a portion of the respondent's evidence was procured through the illegal interception of telephone and telegraph messages and the question of the propriety of a preliminary inquiry to ascertain that fact. The case is assigned for argument immediately following No. 42.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler and Mr. Justice Reed took no part in the consideration and decision of this application.



**FILE COPY**

Office - Supreme Court, U. S.

**FILED**

**JUL 28 1939**

**THOMAS HENDRE CROPLEY**  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1939.

No. **240**

**FRANK CARMIÑE NARDONE, NATHAN W. HOFFMAN,**  
and **ROBERT GOTTFRIED,**

*Petitioners,*

*against*

**UNITED STATES OF AMERICA,**

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF  
IN SUPPORT THEREOF.**

**DAVID V. CAHILL,**  
*Attorney for Petitioner,*  
*Frank Carmine Nardone,*  
11 Broadway,  
Manhattan, New York City.

**WEGMAN & CLIMENKO,**  
*Attorneys for Petitioner,*  
*Nathan Hoffman,*  
60 Wall Street,  
Manhattan, New York City.

**LOUIS HALLE,**  
*Attorney for Petitioner,*  
*Robert Gottfried,*  
60 Wall Street,  
Manhattan, New York City.

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### STATUTE INVOLVED.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1939.

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FRANK CARMINE NARDONE, NATHAN W. HOFFMAN,  
and ROBERT GOTTFRIED,

*Petitioners,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

---

**Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Second Circuit.**

*To the Honorable the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

Your petitioners respectfully represent:

I. That on July 20th, 1939, the Circuit Court of Appeals for the Second Circuit affirmed a judgment of conviction in a criminal cause against petitioners, which had been entered in the District Court of the United States for the Southern District of New York; But the Court in its opinion expressed doubt on the primary question involved in the appeal and, although it had previously and before the argument of the appeal, denied an application for the release of petitioners on bail, it unanimously directed in its opinion affirming the judgment that they be released on bail, upon condition that they file in this Court an application for a writ of certiorari within a specified time.

II. The judgment herein was entered upon a second trial of substantially the same issues. A judgment of conviction previously obtained on an indictment similar to the present

superseding indictment was reversed by this Court for error in the admission of evidence, obtained by unlawful interceptions of telephone and telegraph messages in violation of Section 605 of the Communications Act (48 Stat. 1103).

*Nardone v. United States*, 302 U. S. 379.

The principal basis of this petition is that the rule laid down by this Court in that decision was circumvented and in effect disregarded in the trial of the second cause, and that the technique, by which the circumvention was accomplished, violated the statute.

III. The crimes alleged in the present indictment were:

1. Unlawfully, wilfully and knowingly defrauding the revenue of the United States by smuggling, and clandestinely introducing into the United States, in violation of law, a quantity of alcohol, in violation of U. S. C. Title 19, Section 1593-a; and U. S. C. Title 18, Section 550.

2. Unlawfully, wilfully, knowingly and fraudulently receiving, concealing and facilitating the transportation of alcohol brought into the United States contrary to law in violation of U. S. C. Title 19, Section 1593-b; and U. S. C., Title 18, Section 550.

3. Conspiracy to commit divers offenses against the United States, to wit: to violate the provisions of the Tariff Act of 1930, more specifically, Title 19, Sections 1493-a and 1593-b.

Judgment of conviction was entered against petitioners and sentence was passed on March 23rd, 1939, as follows:

Petitioner Frank Carmine Nardone to a total of two years in the United States Penitentiary, concurrent sentence for that period being imposed, and a fine of \$3,000.00.

Petitioner Nathan W. Hoffman to a total of two years in United States Penitentiary, concurrent sentence for that period being imposed, and a fine of \$2,500.00.

Petitioner Robert Gottfried to a total of one year and a day in United States Penitentiary, concurrent sentence for that period being imposed.

Petitioners were immediately incarcerated and applications to the trial Court, the Circuit Court of Appeals and this Court for their release on bail pending the determination of their appeal were denied.

In this connection the remarks of the Circuit Court of Appeals in the opinion affirming the conviction herein may be noted:

"When we denied bail originally, we had not had the chance to examine the record or to appreciate the doubts which have now appeared."

IV. The assignment of errors, filed below on behalf of petitioners, presented *inter alia* the following questions which were argued and decided in the Circuit Court of Appeals:

(a) Whether the trial Court erred in overruling the objection made on behalf of petitioners to the introduction of evidence, obtained by unlawful interceptions of telephone and telegraph messages, and in curtailing the inquiry, and denying a full inquiry into the admissibility of such evidence and rejecting an offer of proof as to its inadmissibility.

The offer of proof and the circumstances attending the trial Court's rulings, as well as the rulings themselves will be set forth in the accompanying brief for petitioners.

(b) Whether basic rules of evidence were disregarded in the admission of evidence.



(c) Whether, eliminating evidence improperly received there was sufficient evidence to present a question of fact for the jury.

### Questions Presented.

V. The following are the questions presented for review by this Court:

A. Telephone and telegraph messages were intercepted by agents of the Government in violation of Section 605 of the Communications Act prior to the first trial and the judgment of conviction was reversed by this Court, because the records of the interceptions were received in evidence.

These records were retained by the Government and were referred to and used by some of its agents at various times including apparently the period of preparation for both the first and the second trial.

It became apparent at the second trial during the examination of the first witness that the Government had availed itself and at the trial was availing itself of the information obtained by the unlawful interceptions. The Court's attention was called to the fact (Record, f. 122) but action was deferred until the witness had been fully examined. At the conclusion of his examination, counsel for petitioners moved that his testimony be stricken on the ground that this evidence had been obtained by unlawful interception of telephone and telegraph messages, by the process commonly known as wire-tapping, in violation of Section 605 of the Federal Communications Act, and that the existence of the witness, the fact that he was a witness to some of the transactions, and the relations between the defendants and of the witness with the defendants and other persons alleged to be co-operating with them were revealed by the unlawful interceptions. The Court announced that this matter would be taken up later in the trial (R., fols. 136-138).

Petitioners renewed their objection at the close of the second witness' testimony and made an offer of proof that the evidence of both witnesses represented the fruits of the "Wire tapping" (R. fols. 147-151). The offer was made quite pointed and specific in the ensuing colloquy between the Court and counsel (fols. 152-164). The motion was denied and an exception was taken.

The offer of proof and the motion to strike were repeated frequently throughout the trial with the same result and exceptions were duly taken (fols. 282, 413, 425, 454).

Finally at the close of the Government's case the Court consented to take up the matter and began an inquiry into the source of the evidence. It took the position that the inquiry presented a question that could not be ruled on until all of the Government's testimony was in (f. 796). A Government agent who had participated in the wire-tapping, was called as a witness by the defense. Counsel for the Government after a few questions, objected to the questions on the ground that the statute (Section 605 of the Communications Act) was not aimed at interceptions but only at the divulging of intercepted messages (fols. 799-800). The objection finds no support in the statute but it was sustained by the Court (f. 800).

*However, the inquiry proceeded with interruptions sufficiently to reveal that the witness, who was active in the case, did not know Nardone, Hoffman or Gottfried prior to the interception of the messages (f. 805) nor had he heard of Geiger, the Government's first witness (f. 808), and he knew nothing of any relations between Nardone and Geiger (f. 809).*

The Court interrupted the inquiry again (fol. 809), and counsel pointed out that they were building up the evidence and previously had no information of the Government's witnesses or what it would do in making its case (fols. 811-

812). The Court then reversed its previous position and stated that the inquiry should have been made at the beginning of the trial.

As already pointed out, petitioners through their counsel had made their objection when the first witness was on the stand but the Court itself had deferred the inquiry. After a long colloquy between the Court and counsel, the Court was furnished with a list of Government witnesses, the admissibility of whose evidence was challenged, and an offer was made to prove that their testimony had been unlawfully obtained (fol. 837). Reluctantly the Court permitted the interrupted inquiry to be again resumed. *It was then shown that the witness Kozac had listened over tapped wires to over six hundred and fifty (650) messages and had thereby learned among other things of the existence of Geiger (also known as "Jiggs") the Government's first witness, of his acquaintance with petitioners and his business associations with them (fols. 838-839).*

Defendants' Exhibit A, containing testimony of Martin, a Government agent, in a removal proceeding, was offered to prove that the Government's information came from the tapping of wires and was marked only for identification (fols. 861-862). Specific records of interceptions were offered as the basis for proof as to the source of the Government's evidence, but they were excluded (f. 865).

Defendants' Exhibit B, containing records of interceptions and testimony relating to them, received at the first trial, was also marked for identification.

The inquiry was then abruptly halted by the Court, and all objections and motions on behalf of petitioners were overruled (fols. 865-867).

Thereafter exception was taken on behalf of petitioners and motion was made to strike the testimony of eighteen (18) witnesses (fols. 901-902).

The Government was permitted for some reason to call a witness, a Government supervisor, apparently in rebuttal of the one witness, whom counsel for defense had been permitted to examine incompletely.

He attempted to show that the Government had some sources of information independent of the tapped wires. For present purposes his testimony is unimportant and may be disregarded, because it would be unfair to give the slightest consideration to an issue of fact thus created. Petitioners were prevented from presenting their evidence beyond the incomplete examination of one witness. The trial Court was unwilling either to hear witnesses or receive records bearing on the interceptions and stated:

"If I am wrong the Circuit Court will order some unfortunate judge to listen to all of it" (f. 864).

The fundamental error was in limiting the inquiry as to the source of the evidence. Indeed, it may fairly be said that the trial Court denied any inquiry, although an adequate offer of proof was made and was repeated several times.

In its opinion, the Circuit Court of Appeals said on this point:

"In substance the judge stopped the inquiry, for it did not help to give leave to the accused, as he did, to examine as to any specific evidence they could point out. Evidence does not bear the ear-marks of its acquisition."

Furthermore, in this cause the trial Court brought in the question whether intrastate messages are under the ban of the statute, and whether it is enumbent upon defendants, objecting to evidence, to show that the messages intercepted were of an interstate character. Folios 802, *et seq.* This case is the subject of conflicting decisions in

the several circuits and is therefore urged as appropriate for consideration on this application and for review by this Court. It is urged also in this connection that even without this question, the question already posed is sufficient to require review by certiorari.

B. The rule as to the admission of acts and declarations of co-conspirators was stretched so as to admit hearsay evidence of a type rarely offered in court as proof of anything.

One Murphy, a seaman on a vessel alleged to be engaged in rum running, was permitted over objection to state that Mahe, wireless operator on the vessel, showed him a list on which the name of Nardone was included as one of the owners of the cargo (fols. 369-370). Mahe was not called as a witness. The list was not produced or accounted for. There was no proof as to the authorship of the list, nor as to the source of information, from which the unknown author obtained his alleged facts. There was no way in which the accuracy of the information could be tested. The theory of admissibility apparently rested on the assumption that because Murphy and Mahe were connected with the vessel, they must be assumed to be co-conspirators, and anything they might say, even though it be idle gossip on a cruise in the tropics, could be used against a person, whom they did not know, and with whom they had no dealing. There was no proof that they were co-conspirators, that they knew the conspiracy or its objects, and no ground for the presumption that they were guilty of a crime because they were on board the vessel on a certain day. Even conspiracy cases, more loosely tried than any other type of criminal case, seldom reveal such a dangerous departure from the hearsay rule. And the evidence went to the heart of the case, dealing directly with the question whether Nardone was in the conspiracy to smuggle liquor into the country.



C. If the improper and prejudicial evidence were excluded, the case could not have been submitted to the jury. It is urged therefore that as a matter of law, its submission was error.

We understand that the question of sufficiency of the evidence by itself will not ordinarily be considered by this Court on an application of this kind. But under the peculiar circumstances of this cause, and the close connection of this point with the others raised, it is urged as appropriate for consideration.

### **Reasons for Granting the Writ.**

VI. Your petitioners respectfully urge that, as shown above and as will be further urged in the brief accompanying this petition, the Circuit Court of Appeals has rendered a decision in conflict with applicable decisions of this Court, has affirmed a judgment obtained by circumventing and evading a rule laid down by this Court, and has decided an important question of Federal law in a manner which leaves that question and the rule of law in grave doubt, and that the questions presented are of wide interest and application and are likely to arise in a large number of cases in the various circuits.

WHEREFORE, your petitioners pray that a writ of certiorari may issue out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the order of the said United States Circuit Court of Appeals affirming the judg-

ment in this cause may be reversed, and that petitioners may have such other relief as this Court may deem appropriate.

Dated New York, N. Y., July 27th, 1939.

FRANK CARMINE NARDONE

By

*David V. Cahill*

Attorney

NATHAN W. HOFFMAN.

By

*Wegman & Clements*  
*Mr. Jesse Clements*

Attorneys

ROBERT GOTTFRED

By

*Louis Halle*

Attorney

STATE OF NEW YORK, }  
COUNTY OF NEW YORK, } ss. :

JESSE CLIMENKO, being duly sworn, deposes and says:

I am one of the attorneys for the petitioners herein. They are at present incarcerated. I have read the foregoing petition and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

JESSE CLIMENKO.

Sworn to before me this }  
*27th* day of July, 1939. }

MARRIET COHEN

NOTARY PUBLIC, Kings County

Kings Co. Clk's No. 731 Reg. No. 1405

Certified true and correct

New York Co. Clk's No. 10528

Commission expires March 30, 1941

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1939.

---

FRANK CARMINE NARDONE, NATHAN W. HOFFMAN,  
and ROBERT GOTTFRIED,

*Petitioners,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

---

**BRIEF IN SUPPORT OF PETITION FOR  
CERTIORARI.**

---

**Statement.**

Some of the essential facts have been stated in the petition. An adequate statement would unduly prolong the brief and is unnecessary for the reason that the primary question involved is purely one of law. The facts have been stated sufficiently to make intelligible the primary question of law. The opinion of the Circuit Court of Appeals is printed at the end of the Record.

**Jurisdiction.**

The decision affirming the conviction was handed down on July 20, 1939.

The jurisdiction of this Court is invoked under Sections 237 and 240 (a) of the Judicial Code as amended, and under the Rules of Practice and Procedure of this Court.

### Statute Involved.

SECTION 605, TITLE 47, U. S. C. A., 48 STAT. 1103.

(June 19th, 1934).

No person receiving or assisting in receiving or transmitting or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing offices of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information as so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information herein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

## POINT I.

**The Circuit Court of Appeals erred in deciding that the action of the Trial Court in denying petitioners an inquiry into the admissibility of evidence alleged to have been obtained by unlawful interception of telephone and telegraph messages, and in overruling objections to such evidence, did not constitute reversible error.**

The Circuit Court of Appeals in its opinion expressed doubt on this question and virtually suggested that petitioners apply to this Court for a writ of certiorari. That Court had previously denied bail to petitioners but stated that it would not have done so if it had had an opportunity to examine the record at the time of the application. It rectified the situation by unanimously directing that petitioners be released on bail, upon the sole condition that they should apply to this Court for a writ of certiorari within a specified time.

The language of the opinion demonstrates the seriousness of the questions and the grave doubts which the appellate Court entertained on the subject.

In reversing the judgment of conviction entered on the first trial of this cause, this Court held that Government agents as well as other persons were forbidden to intercept telephone and telegraph messages, and that the use of records of those messages as evidence against defendants was forbidden by Section 605 of the Federal Communications Act. In the trial which resulted in the present judgment, the records of intercepted messages were not directly used, but they had been retained by the Government and were made available to agents of the Government for investigating and preparing the case for the second trial (Record, fols. 896-898).



As already stated, counsel for the petitioners, while the first witness for the Government was on the stand, called the Court's attention to the question as to the source of his evidence, but action on this matter was deferred by the Court (fol. 122). At the conclusion of the first witness' examination, a motion was made to strike the testimony of the witness on the ground that his evidence had been obtained by unlawful interception of telephone and telegraph messages in violation of Section 605 of the Federal Communications Act. The Court announced that this matter would be taken up later in the trial (fols. 136-38).

Petitioners renewed their objection at the close of the 'second witness' testimony and frequently throughout the trial, and exceptions were taken on their behalf to the Court's failure to sustain their objections (fols. 147-51; 152-164; 282; 413; 425; 454). In addition to the objections made, formal offers of proof were made on behalf of petitioners. These were offers to prove that the evidence of various witnesses represented the fruits of wire tapping, that the existence of the witnesses, the fact that they were witnesses to some of the transactions of petitioners, and the relation between petitioners, and the relation of the witnesses with them and with other persons, had been revealed by the unlawful interception of telephone and telegraph messages. Ultimately these objections included the testimony of 18 witnesses (fol. 837). The Trial Court at first declared that it would take the matter up later in the trial and stated at one point during the trial that it could not pass on the question until all of the Government's evidence had been presented (fol. 796).

Finally, at the close of the Government's case, the Court permitted petitioners to begin the presentation of their evidence as to the inadmissibility of the Government's evidence. The first witness called in this inquiry was Kozac, a Government investigator. The inquiry was frequently

interrupted by the Court and counsel for the Government, and objections were sustained without clear reason for the rulings. The inquiry was brief, and having been punctuated by frequent interruption and arguments, it produced only a few facts. The examination of the witness was never completed because it was stopped by the Court.

The Circuit Court of Appeals in its opinion called attention to this fact:

"In substance, the Judge stopped the inquiry, for it did not help to give leave to the accused, as he did, to examine as to any specific evidence they could point out. Evidence does not bear the earmarks of its acquisition. One thing leads to another, and if the original taint pervades the last scrap of evidence eventually found, the accused will not get his rights short of a complete disclosure."

As stated by the Appellate Court, the inquiry was stopped by the Trial Court and was stopped in its early stages, so that it may justly be said there was no real inquiry into the admissibility of the evidence at all. The few facts disclosed by the limited questions which petitioners' counsel were permitted to ask revealed that there had been interceptions of 650 messages, and that the Government investigator who was testifying had thereby learned, among other things, of the existence of Geiger, the first witness, and of his dealings with petitioners (fols. 838-839). It was also revealed that prior to the interception, the witness did not know Nardone, Hoffman or Gottfried (fol. 805). The trial court had expressed reluctance to inquire into the admissibility of the evidence to which petitioners had objected, and thereafter begrudged the time necessary to a full inquiry. The Court's attitude is aptly illustrated by its remark, already quoted: "If I am wrong, the Circuit Court will order some unfortunate Judge to listen to all of it" (fol. 863). The fundamental error

was the unwillingness of the Court to ascertain whether the Government was evading in the second trial the rule laid down by this Court in the first case. As the matter now stands, there is no specific proof as to the manner in which the evidence presented was connected with the interceptions because the trial Court refused to receive such proof. But adequate offers of proof were made, and counsel for petitioners by these offers sought an opportunity to establish that the records of unlawfully intercepted messages, the admission of which had been condemned in the review of the first trial by this Court, had been retained and used in the preparation for the second trial, and that the information obtained by the unlawful interceptions formed a vital part of the Government's evidence in the second trial. This situation, i. e., the failure of the trial Judge to permit the defendants an adequate opportunity to pursue their proposed discovery, gave rise to the doubt expressed by the Circuit Court in its opinion:

*"From what we have said it is apparent that we think that the result here is doubtful."*

The Court below, in discussing this point, considered the effect of *Olmstead v. U. S.*, 277 U. S. 438. That case dealt solely with the question of whether the tapping of wires constituted an unlawful search under the Fourth Amendment. With all due respect to the Court below, it is urged that that question is not presented in the instant case. The primary question here is whether in the face of an express legislative ban on the interception of telephone and telegraph and similar messages, Government agents may nevertheless commit the crime of making such interception and use the information thus obtained as evidence in a criminal prosecution. The direct use of the interceptions themselves was declared unlawful and their use as evidence was found to constitute reversible error by this Court in the review of the first trial, *Nardone v.*

U. S., 320 U. S. 379. In the present cause, it is sought to justify the indirect use of information obtained by the crime of wire tapping. The Court below thought that while in the case of an unlawful search or seizure offending against the Fourth Amendment, indirect as well as direct use of the evidence was prohibited, the law might be different in the case of a statute thus evaded. No reason for the distinction was given and none has been stated in any report or authority as far as we have been able to discover. It is urged that when Congress has declared a legislative policy with respect to evidence in a Federal trial and has forbidden the use of such evidence and the obtaining of evidence by certain means, the evasion of the ban by an indirect use of the evidence is error for precisely the same reason and in the same degree as if the Fourth Amendment or some other provision to the Constitution were violated (Article 6, Clause 2, of the Constitution of the United States). The reasoning in *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385, is clearly applicable in the present cause. There the Court was dealing with an unlawful seizure of papers which was held to have violated the Fourth Amendment. The papers were returned, but subsequently subpoenas to produce them were served and upon refusal to comply with the requirement of the subpoena, the owners of the papers were held in contempt. This Court there said:

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit

by doing the forbidden act. *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915 B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915 C, 117, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the 4th Amendment to a form of words. 232 U. S. 393. *The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.*"

The logic of this statement is so clear in its application to the present situation, that elaboration upon it is unnecessary. Whether the law forbidding the acquisition and use of evidence in a certain manner be constitutional or ordinary legislation, it must be given effect, and the ban must be enforced by forbidding indirect as well as direct use of the information unlawfully obtained. Any other construction of Section 605 of the Federal Communications Act would reduce that statute to a mere form of words and would render it wholly ineffective to accomplish the purpose of Congress. It is urged that the reasoning of the *Silverthorne* case applies with equal force to the case at bar.

The Court below clearly doubted whether there was any distinction for this purpose between a constitutional provision and a legislative enactment and for that reason desired a review of its decision by this Court.

The other points raised in the petition will not be discussed for the reason that reliance is placed mainly upon the sole point discussed in this brief, which the Court below suggested as appropriate for review.



**CONCLUSION.**

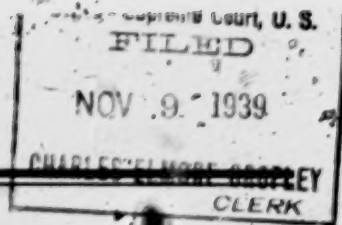
For the foregoing reasons, it is submitted that the serious question of law involved in this application is of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Dated: July 27, 1939.

Respectfully submitted,

DAVID V. CAHILL,  
WEGMAN & CLIMENKO,  
LOUIS HILLE,  
*Attorneys for Petitioners.*

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**Supreme Court of the United States**  
**OCTOBER TERM, 1939**

**No. 240**

**FRANK CARMINE NARDONE, NATHAN W. HOFFMAN and  
ROBERT GOTTFRIED,**

*Petitioners,*

*against*

**UNITED STATES OF AMERICA,**

*Respondent.*

**BRIEF ON BEHALF OF PETITIONER NARDONE.**

**DAVID V. CAHILL,**  
**.11 Broadway, New York City,**  
**Attorney for Petitioner,**  
**FRANK CARMINE NARDONE.**

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# Supreme Court of the United States

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No. 240

FRANK CARMINE NARDONE,  
NATHAN W. HOFFMAN and  
ROBERT GOTTERIED,

*Petitioners,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

### BRIEF ON BEHALF OF PETITIONER NARDONE.

#### Opinion Below.

The opinion of the Circuit Court of Appeals, reported in 106 Fed. (2nd) 41, appears in the record at page 358 *et seq.*

No opinion was rendered by the United States District Court for the Southern District of New York, in which the cause was tried.

#### Jurisdiction.

The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938, Title 28 U. S. C. A. Section 347 (a).



The judgment of the Circuit Court of Appeals was entered on July 28, 1939, and petition for certiorari was filed the same day. The writ of certiorari was granted on October 10, 1939.

### Questions Presented.

As limited by this Court in granting the writ, the questions presented for review are:

- 1—Did the Trial Court correctly dispose of petitioners' claim that a portion of respondent's evidence was procured through the illegal interception of telephone and telegraph messages?
- 2—Was a preliminary inquiry to ascertain that fact proper?

### Statute Involved.

These questions turn upon the interpretation to be given Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103, Title 47, Section 605. The statute provides that:

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a Court of competent jurisdiction, or on de-

mand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof; or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

### **Errors To Be Argued.**

The questions presented, as already stated, have been limited by this Court in granting the writ, and the argument on behalf of this petitioner will be addressed to those questions.

The errors assigned are numbers 3, (R. p. 349) 19, 20, 21, 22, 25 (p. 351), 27, 28, 29 (p. 352).

They present in substance these questions:

- 1—Whether on the state of facts (which petitioners at the trial offered to prove) the Government in presenting its case did not utilize and introduce

in evidence information obtained by illegal telephone and telegraph interceptions.

2—Whether the Trial Court erred in refusing to permit a preliminary inquiry into that question.

As to the second question, so as to avoid any misunderstanding of the facts, it may be noted that an inquiry was begun (p. 266), but after much argument and many limitations imposed by the Trial Court, under which the scope of the inquiry was vaguely limited, but not defined (pp. 266, 267, 270-279, 285-287), the inquiry was abruptly halted (pp. 288-289). It is contended that the Trial Court's action in effect denied petitioners any inquiry whatever into the admissibility of the testimony.

### Statement.

This is the second time this Court has been asked to review substantially the same case. A judgment of conviction obtained on a similar indictment was reversed by this Court for errors in the admission of unlawfully intercepted telephone communications. (*Nardone v. United States*, 302 U. S. 379.) The judgment now under review was based on a superseding indictment alleging in somewhat fuller form the same transactions as those alleged in the first indictment and other related transactions and some new defendants were included. The accusations were that defendants smuggled alcohol, and concealed it after the smuggling in violation of the Tariff Act of 1930 (Title 19 U. S. C., Sec. 1593), and conspired to smuggle and conceal alcohol in violation of a familiar statute, Section 37 of the Criminal Code, Title 18 U. S. C., Sec. 88.

Upon conviction the petitioners were sentenced as follows:

Nardone to terms of two years on every count, the sentence to run concurrently, and a fine of \$3,000.

Hoffman, to the same prison sentence, but a fine of \$2,500.

Gottfried, to a prison sentence of one year and one day, and no fine.

Applications for bail to the District Court and the Circuit Court of Appeals pending appeal were denied, but in its opinion affirming the judgment the Circuit Court of Appeals stated that if it had an opportunity to read the record at the time of the application it would have granted bail.

"When we denied bail originally, we had not had the chance to examine the record or to appreciate the doubts which have now appeared.

Judgment affirmed; appellants admitted to bail in case they apply for certiorari within ten days after this opinion is filed."

*United States v. Nardone*, 106 Fed. (2nd) 41, 44; page 358 of this Record.

Petitioners accordingly have been enlarged on bail.

The Government's theory of the case rested almost wholly upon the charge of conspiracy, and the case was tried in the usual mode employed by prosecutors in this type of case. The broad sweep of the evidence makes a succinct statement difficult, if not practically impossible.

The two substantive offenses, the smuggling of alcohol into the port of New York in a particular instance and the concealment of that alcohol after the smuggling, were mere incidents of the trial.

The conspiracy is alleged to have begun on January 2, 1935, and continued to May 14, 1936. The proof both as to dates and events, in so far as petitioners are concerned, lacks definiteness, precision and substance, but in view of the limitations imposed by this Court on the questions for review, this subject will be dismissed with a passing glance.

It may and should be said that, while allegations and evidence related to widespread operations in various districts of the United States and beyond our boundaries, there was no proof that Nardone, or the other petitioners, were present or directly participating in these operations. The theory of their connection with the smuggling scheme was that they were participating from New York and aiding in the consummation of the scheme in varying degrees, while absent from the scene of operations. The interpretations placed upon their telephonic and other communications and the leads furnished by the tapping of wires undoubtedly played a large part in building up the case against them.

It was contended that a large vessel brought alcohol from abroad to various points off our shores, where it was transshipped to smaller boats, which brought it ashore. That was the plan at any rate and in a few instances it is said to have been successful. The movements of the vessels were said to have been directed to some extent by a radio operator employed by the conspirators.

At the first trial the Government introduced direct proof of the intercepted telephone and telegraph communications by testimony of the Government agents, who made the interceptions. The reversal by this Court was based on error in the admission of this evidence.

At the second trial now under review a different technique was employed. The wire-tapping agents were not called as witnesses.

The Government had retained records of the messages previously intercepted and introduced at the prior trial (R. p. 299).

Besides the three men, who made the interceptions, four or five others also of the Alcohol Tax Unit referred to them in the course of their investigation (p. 299) and apparently members of other government agencies, as members of a committee working on the case, had access to them (pp. 299-300).



With this background, not disclosed, of course, to the defendants, the second trial began. The first witness was Geiger, a radio operator, who had not testified at the first trial. He was identified as having been mentioned and having participated in the messages intercepted by Government agents (p. 270). Prior to these interceptions, the agents, who made them, knew nothing of any relation between Nardone and Geiger. As will be stated more fully later, the first motion based on the unlawful interception of evidence was made during the testimony of this witness (p. 41). The Court had been informally advised of the ground for the motion prior to the first statement in the record. A formal objection was made at the close of the witness' testimony and this motion stated fully the ground on which petitioners based their claim, that Section 605 of the Federal Communications Act had been violated in obtaining and introducing evidence. There were numerous other objections based on the same ground, which will be specifically stated in the argument. It will suffice to say that in addition to Geiger, the evidence of numerous other witnesses was alleged by petitioners to have been obtained by unlawful interception of telephone messages (p. 279 *et seq.*). The Court after hearing what was virtually a mere introduction to the evidence on this subject, declined to hear further testimony or to permit further examination of the one witness who testified as to the source of evidence (p. 286). When the Court insisted that petitioners should specify the portions of evidence, which might be inadmissible, counsel for petitioners attempted the practically impossible task. The Court finally stopped the inquiry (pp. 286-289). Nevertheless, the Government was permitted to call a witness to testify as to information, which he obtained from informers independently of the intercepted messages. On cross-examination even he admitted that he did not know the things alleged against the defendants before the intercepted messages, and did not even know that the Steamship Southern Sword had come

into port, until after the telephones had been tapped (p. 295). In addition to the offers of proof and the attempts to prove that the evidence of numerous witnesses represented the fruits of illegal tapping of wires, counsel for the defense moved that the testimony of eighteen witnesses be stricken from the record on the same ground. The motion was denied and exception was duly taken. Details of the conspiracy alleged and of the proof offered would not be helpful in the consideration of the questions to which petitioners are limited. It is the contention on their behalf that the errors in connection with these questions in and of themselves are sufficient to require a reversal of the judgment.

### Summary of Argument.

#### POINT I.

**On the state of facts, which petitioners offered to prove, it must be assumed that the Government introduced evidence, derived from unlawfully intercepted communications by wire and radio and it is urged that the reception of this evidence violated both Section 605 of the Federal Communications Act and the Fourth and Fifth Amendments of the Constitution of the United States.**

This point is addressed mainly to the violation of the Federal Communications Act. It is urged that not only the direct, but also the indirect use of unlawful interceptions is forbidden and that by the statute the fruits of the crime of wire-tapping are placed under the same ban as the immediate and original records of the interceptions.

With respect to the violation of the Fourth and Fifth Amendments, the point is urged, with deference and in all courtesy. It is not clear that petitioners under the circumstances of their case are foreclosed of the fundamental rights

of privacy guaranteed by those amendments. The decision in the first *Nardone* case (302 U. S. 379) may have rendered *Olmstead v. United States*, 277 U. S. 438, inapplicable. The Circuit Court of Appeals in this case was in doubt on this subject: "Possibly *Olmstead v. United States* is no longer law."

## POINT II.

**It was reversible error for the Trial Court to deny a full inquiry into the question, whether the evidence, to which objection was made, was derived from unlawful interceptions by wire or radio.**

The Circuit Court of Appeals found that no inquiry was required, if *Olmstead v. United States* were still the law, but conceded that if any inquiry was required, the inquiry, which was begun and then abruptly halted by the Trial Court, would not meet the requirement.

It is the contention of petitioners that without regard to the *Olmstead* case, a full inquiry was a matter of right, without which the inadmissibility of the evidence offered could not be determined. The denial of that right so vitally affected the case as to constitute reversible error.

## Argument.

### POINT I.

On the state of facts, which petitioners offered to prove, it must be assumed that the Government introduced evidence, derived from unlawfully intercepted communications by wire and radio and it is urged that the reception of this evidence violated both Section 605 of the Federal Communications Act and the Fourth and Fifth Amendments of the Constitution of the United States.

The facts, which the petitioners offered to prove, must be assumed to be true for the purpose of this argument. The Trial Court gave no opportunity to test them. The question, therefore, is, are these assumed facts sufficient to prove a violation of the statute?

Counsel for petitioners raised the question by objecting to evidence, moving to strike, and making an offer to prove that the evidence came within the ban of the statute (R. pp. 41, 46, 49-55, 94, 138, 142, 152). The subject is first referred to in the record at the close of the direct examination of the Government's first witness, Geiger, but it is apparent that the matter had been called to the Court's attention earlier: "The Court: The Court has been told of the motion" (p. 41). After the cross-examination and redirect examination of the witness Geiger, counsel for defendants moved to strike his testimony from the record and stated clearly the ground, that the testimony was obtained by the unlawful interception of telephone and telegraph messages by the process commonly known as "wire-tapping" in violation of Section 605 of the Federal Communications Act, and that the very existence of the witness, his relation to the defendants, and their relations with one another and with others had been revealed by the unlawful interceptions, and finally that

the Government had used the records of the interceptions in preparing its case, and in obtaining witnesses and evidence against defendants (p. 46). An offer to prove the facts and a request for an opportunity to do so were coupled with the objection (pp. 50-55). The offer of proof and motion were repeated several times throughout the trial, as already stated, appropriate objections and motions were made and exceptions to the Court's rulings were duly taken (pp. 55, 94, 269).

Counsel for the Government objected to the motion and offer as not being timely, and argued that the motion was governed as to timeliness by the rule laid down for motions to suppress evidence obtained by unlawful search and seizure prior to a trial. The logical distinction between the two types of cases is obvious. The Trial Court properly decided that the motion could not have been made until the trial (p. 266) and the Circuit Court of Appeals took the same view.

In the brief partial examination of the one witness Kozac, a Government agent, which was permitted, it was brought out that he, acting for the Government, had listened by tapped wires to conversations of Nardone, Gottfried, Geiger "and a host of others." He listened to Nardone sending and receiving communications (p. 267). *An objection by the Government, sustained by the Court prevented counsel from showing between what points the conversations were held* (pp. 267-268). He did not know Nardone, Hoffman, Gottfried or Geiger prior to the interceptions. The records of the interceptions, now in the United States Attorney's office, were available to all of the numerous Government investigators (p. 269). He knew nothing about any relations between Nardone and Geiger until he made the interceptions. *During the first two or three weeks the witness heard "possibly several thousand messages"* (p. 284).

The question, therefore, was preserved and is available for review.



The provisions of the statute are unmistakably clear. There are conflicting authorities on the question whether intrastate interceptions are within the statutes. We are informed that question is now before this Court. In this case the question is not important. In the record of the first Nardone trial, which is before this Court now as Defendant's Exhibit B, having been submitted with the petition for certiorari, it is established that many of the interceptions were interstate. It was unnecessary, therefore, to prove this fact at the second trial, because the objection to the evidence and offer of proof were based on the alleged use of the interceptions made prior to the first trial, and introduced in evidence at that trial (p. 289, *et al*).

Clearly there were many interstate messages among the interceptions. If proof of their interstate character were essential, it could not have been adduced because the Trial Court's ruling made such proof impossible. It has been held that the burden of proof to show the messages were not interstate is on the Government. (*Bonanzi v. United States*, 94 Fed. [2d] 570.)

The relevant portion of the statute (Sec. 605) contains a sweeping prohibition of all such interceptions: "• • • and no person not being authorized by the sender shall intercept any communication and divulge or publish the *existence, contents, substance, purport, effect or meaning* of such intercepted communications to any person."

And there is a further unqualified prohibition against use of an intercepted message by one who receives or becomes acquainted with the interception, although he himself did not participate in the crime of intercepting: "and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect

or meaning of the same or any part thereof, or use the same or any information contained therein for his own benefit or the benefit of another not entitled thereto."

*It is significant that Congress expressly forbade the divulging or publication even of the very existence of the intercepted message, and the use of any information contained therein. The contention that the Government might intercept through its agents and was not within the prohibition, was disposed of finally in the decision of this Court in the first Nardone case (302 U. S. 379).*

It is urged that this provision of the statute disposes of the argument that although interception is forbidden the information thus unlawfully obtained is available at a trial. Petitioners offered to prove that the evidence represented information obtained by the interception. In view of the clarity of the language used, it is beyond dispute that Congress intended to prohibit (a) the publication or divulging of the existence, contents, substance, purport, effect or meaning of any intercepted message by any person to any other; and (b) the use of the information derived from an intercepted message for the benefit of any one.

The statute is far more comprehensive in terms than the Fourth Amendment, which guarantees security in broad language, requiring interpretation. Although logic forced the conclusion that evidence, procured by an unlawful search could not be used by the Government at all either directly or indirectly, it was not generally accepted until this Court spoke unmistakably on the subject.

*Silverthorne v. United States*, 251 U. S. 385.

The rule there laid down (p. 391) can not be avoided here:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

The statute now in question is specific almost beyond the need of interpretation.

The case of *Olmstead v. United States*, 277 U. S. 438 has been cited in support of respondent's contention that the evidence here was admissible. The decision in that case was simply that wire tapping is not an unlawful search under the Fourth Amendment. It could not decide the applicability of Section 605, which was not then in existence. The question whether the admission of the objectionable evidence in the case at bar violated the Constitutional inhibition is a distinct question, which will be separately discussed. It is not necessary to be considered in determining the primary question now presented, that is, whether Section 605 was violated.

It has been urged that as a common law rule a Federal Trial Court in a criminal case will not take notice of the manner in which evidence has been obtained. In his dissent in the *Olmstead* case (p. 471) Mr. Justice HOLMES, one of the four dissenting judges, describes this as a "somewhat rudimentary mode of disposing of the question" and points out that the rule was overthrown by *Weeks v. United States*, 232 U. S. 383 and subsequent cases. He answered forcefully the argument that evidence is proper evidence, no matter how it may have been obtained (p. 470): "If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed."

Mr. Justice BRANDEIS, also dissenting in the *Olmstead* case stated expressly that independently of the constitutional question he was of the opinion that the judgment should be reversed. He called attention to the fact that by

the law of the State of Washington wire-tapping is a crime (p. 479). That case had been tried in the District Court for the District of Washington.

— "To prove its case the Government was obliged to lay bare the crimes committed by its officers on its behalf. A Federal Court should not permit such a prosecution to continue. Compare *Harkin v. Brudage*, 276 U. S. 36 id. 604" (p. 480).

Wire tapping is a crime in the State of New York, in which this case originated. (Sec. 1426 Penal Law; c. 40 Consolidated Laws, Secs. 552-553.)

Prohibited wire-tapping is also a crime under Section 501 (Title 47 U. S. C.) of the Federal Communications Act.

In passing it may be noted that unlawful interceptions of messages are deemed prejudicial not only to the defendant who made the communications but to all defendants involved in the transaction.

*U. S. v. Bernava*, 95 Fed. (2nd) 310.

This Court in the first *Nardone* case (p. 384) called attention to the serious controversy raging for years with respect to the morality of wire-tapping by officers to obtain evidence. "It has been the view of many that the practice involves a great wrong." Congress legislated to meet this situation, and to avert the invasion of home as well as office by modern devices, and the destruction of the right of personal security and privacy, which the Constitution was intended to guarantee. It considered the fundamental rights involved of more importance than the mere convenience of law enforcement officers. Its language was unequivocal. The legislation becomes futile and the purpose of it is frustrated, if any one of thousands of Government agents may intercept communications, and circumvent the law against such interceptions by using the fruits of the crime in Court

and elsewhere in every way except by the direct introduction of the messages themselves in evidence. It can not be assumed that Congress intended to express a pious abhorrence and condemnation of the practice, but to wink at its continuance.

With respect to the violation of the Fourth Amendment, it will be noted that although the decision in the *Olmstead* case seemed at the time to dispose of the matter, the subsequent decision in the first *Nardone* case was considered by two Appellate Courts as having possibly re-opened it for further consideration.

*United States v. Nardone*, 106 Fed. (2nd) 41;  
*Valli v. United States*, 94 Fed. (2nd) 687.

It is respectfully urged that the potential dangers to fundamental rights, already amply illustrated by concrete cases, would justify and may require further interpretation of the safeguards, established by the Bill of Rights, and a broader statement of their application than was made in the *Olmstead* decision.

## POINT II.

**It was reversible error for the Trial Court to deny a full inquiry into the question, whether the evidence, to which objection was made, was derived from unlawful interceptions by wire or radio.**

This proposition follows as a corollary from the one above argued.

If the fact of unlawful interception is pertinent and proper as a ground for objection to the evidence, the inquiry asked of necessity must be proper and essential. The sole ground for objection to the inquiry was that it was not timely. As already pointed out, this objection was elim-



inated by the decision in *Weeks v. United States*, 232 U. S. 383 and decisions which followed it. The Circuit Court of Appeals in this case, while doubtful of the extent to which the legislative prohibition might be carried, suggested that if there were to be a discovery, it must be complete, 106 Fed. (2nd) 41, 44:

"In substance the judge stopped the inquiry, for it did not help to give leave to the accused, as he did, to examine, as to any specific evidence they could point out. Evidence does not bear the earmarks of its acquisition. One thing leads to another, and if the original taint pervades the last scrap of evidence eventually found, the accused will not get his rights short of a complete disclosure."

A substantial reason for a complete disclosure was demonstrated when the request for an inquiry was made.

Defendant's Exhibits A and B (for identification) the records of the previous trial and of a removal hearing, contained evidence, not disputed, that the Government had unlawfully intercepted messages, and there was a reasonable inference that it had obtained by that means, witnesses and evidence used at the second trial. The offer of proof went beyond these exhibits, but in themselves they afforded definite evidence that the proposed inquiry was not sought as a fishing inquiry, born of curiosity and optimism. It was clear error for the Court under such circumstances to insist upon specifications of evidence unlawfully obtained and used, as a condition precedent to an inquiry. Since neither the identity of the witnesses, nor their testimony, nor for that matter any of the Government's evidence was disclosed to petitioners in advance, and the use made of the "tapped" messages was likewise shrouded in secrecy, a full and complete inquiry was essential to determine whether and how far the agents of the Government had violated the law and

circumvented the rule laid down by this Court. The circumstances pointed to the conclusion, but it could be established only by questioning those, who had obtained and used the information.

### CONCLUSION.

The judgment of the Court below should be reversed for error in denying an inquiry into the alleged violation of Section 605 of the Federal Communications Act in obtaining evidence and in receiving evidence demonstrably violative of that statute.

Dated, New York, N. Y., November 1, 1939.

Respectfully submitted,

DAVID V. CAHILL,  
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FRANK CARMINI NARDONE.

NOV. 10 1939

CHARLES ELMORE CROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM—1939.

No. 240.

FRANK CARMINE NARDONE, NATHAN W.  
HOFFMAN, and ROBERT GOTTFRIED,  
*Petitioners,*

AGAINST

UNITED STATES OF AMERICA,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT.

**BRIEF ON BEHALF OF ROBERT  
GOTTFRIED, PETITIONER.**

LOUIS HALLE,  
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*Robert Gottfried,*  
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Manhattan Borough,  
New York City.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM—1939.

No. 240.

FRANK CARMINA NARDONE, NATHAN  
W. HOFFMAN and ROBERT GOTTFRIED,

*Petitioners,*

AGAINST

UNITED STATES OF AMERICA,  
*Respondent.*

**Brief on Behalf of Appellant, Robert Gottfried.**

**Opinion Below.**

No opinion was rendered by the District Court of the United States for the Southern District of New York. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 107 Fed. (2nd) 41.

**Jurisdiction.**

Judgment of the Circuit Court of Appeals was entered July 28th, 1939. Petition for a writ of certiorari was granted on October 9th, 1939. The jurisdiction of this Court rests on section 240a of the Judicial Code as amended by the act of February 13th, 1925.

**Questions Presented.**

As limited by this Court in granting the writ, the questions presented for review are:

1. Did the trial court correctly dispose of petitioners' claim that a portion of respondent's evidence was procured through the illegal interception of telephone and telegraph messages?
2. Was a preliminary inquiry to ascertain that fact proper?

### **Statement of the Case.**

On July 20th, 1939, the Circuit Court of Appeals for the Second Circuit affirmed a judgment of conviction against the appellants upon a second trial of substantially the same issues on a superceding indictment which had been entered in the District Court of the United States for the Southern District of New York. The former judgment of conviction on the original indictment was reversed by this Court since evidence was erroneously admitted by the trial court, having been obtained by unlawful interception of telephone and telegraph messages in violation of Section 605 of the Communications Act, 48 Stat. 1103.

*Nardone v. United States*, 302 U. S. 379.

At the second trial, now under review, the Government did not directly introduce the intercepted telephone and telegraph communications by the agents who made the interceptions. However, the Government had retained records of the messages previously intercepted and introduced at the prior trial (R., 299). Besides the men who made the interceptions, members of the Alcohol Tax Unit referred to them in the course of their investigation (R., 299), and members of other Government agencies who worked on the case, had access to them (R., 299, 300):

While the defendants knew that the Government must have had the illegally obtained information used on the first trial they had no idea that such information had been

retained for use on this second trial, since it was reasonable to presume that the Government would not attempt to re-use inadmissible proofs. However, it became apparent at the second trial during the examination of the first Government witness that the government had availed itself of, and at the trial was availing itself of, the information which this Court ruled inadmissible as evidence on the former trial. The Court's attention was called to the fact (R., 41) but action was deferred until the witness had been fully examined. The Court announced, upon motion made to strike out the witnesses' testimony at its conclusion, that the matter would be taken up later in the trial (R., 46). Counsel for appellant renewed their objections frequently throughout the trial and made offers of proof that the evidence of some witnesses represented the fruits of "wire tapping" and exceptions were duly taken upon denial of the motion (R., 49-55, 94, 138, 142, 157). At the close of the Government's case the court consented to take up the matter and permit an inquiry into the source of the evidence (R., 264, 265). Joseph A. Kozac, a government agent who had participated in the wire tapping, was called as a witness by the defendants. After a few questions the United States Attorney objected on the ground that the statute, Section 605 (*supra*), was not aimed at interceptions but only at the divulging of intercepted messages (R., 267), and the objection was sustained by the Court although the Government's contention is not supported in the statute (R., 267).

The Court interrupted the inquiry again (R., 270) and counsel for the appellants pointed out that they were building up the evidence and had previously had no information of the government's witnesses or proofs (R., 271). The Court then reversed its previous decision and stated that the inquiry should have been requested at the beginning of the trial (R., 271).

After a long colloquy between the Court and counsel, the Court was furnished with a list of Government wit-

nesses, the admissibility of whose evidence was challenged, and an offer was made to prove that their testimony had been unlawfully obtained (R., 279). Reluctantly the Court permitted the interrupted inquiry to be again resumed. It was then shown that the witness Kozac had listened over tapped wires to over six hundred and fifty (650) messages and had thereby learned among other things of the existence of Geiger (also known as "Jiggs") the Government's first witness, of his acquaintance with petitioners and his business associations with them (R., 280).

Defendants' Exhibit A, containing testimony of Martin, a Government agent, in a removal proceeding, was offered to prove that the Government's information came from the tapping of wires and was marked only for identification (R., 287, 288). Specific records of interceptions were offered as the basis for proof as to the source of the Government's evidence, but they were excluded (R., 289).

Defendants' Exhibit B, containing records of interceptions and testimony relating to them, received at the first trial, was also marked for identification (R., 289).

The inquiry was then abruptly halted by the Court, and all objections and motions on behalf of petitioners were overruled (R., 289).

Thereafter exceptions were taken on behalf of petitioners and motion was made to strike the testimony of eighteen (18) witnesses (R., 901, 902).

The Government was permitted to call a witness, William E. Dunigan (R., 290) a Government supervisor, apparently in rebuttal of the one witness whom counsel for defense had been permitted to examine *incompletely*.

He attempted to show that the government had some sources of information independent of the tapped wires. For present purposes his testimony is unimportant and may be disregarded, because it would be unfair to give the slightest consideration to an issue of fact thus created since the appellants were prevented from presenting their evidence beyond the incomplete examination of one wit-

ness. The trial Court was unwilling either to hear witnesses or receive records bearing on the interceptions and stated:

"If I am wrong the Circuit Court will order some unfortunate judge to listen to all of it" (R., 288).

### **Statutes Involved.**

FIRST: Section 605 of the Federal Communications Act of 1934 (Ch. 652, 48 Stat. 1064, 1103; Title 47, U. S. C., Section 605):

"605. Unauthorized publication or use of communications.—No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own bene-



fit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, sec. 605, 48 Stat. 1103.)"

SECOND: Article 6, Clause 2 of the Constitution of the United States:

"Article 6, Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

## POINT I.

The evidence submitted by the Government on the trial was inadmissible since it must be presumed that it was in the nature of "secondary evidence" which had been obtained from the judicially determined inadmissible, illegally secured wire tapings, which were the "primary evidence" used on the first trial.

While it is not the contention of the appellant that one of his constitutional rights was abridged when the federal agents, who testified on the original trial of the case; violated section 605 of the Communications Act (*supra*), to obtain their evidence, it is essential to the argument herein that where evidence is illegally obtained in violation of the 4th amendment such evidence may not be used in the federal courts and cannot be subsequently employed, even if later obtained in a legal manner; unless the later knowledge is gleaned from an independent and legally proper source.

*Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 391, 392.

In the *Silverthorne* case (*supra*), Mr. Justice Holmes, on page 391 of his opinion cites with approval (*Flagg v. United States*, 233 F. 481, 493, indicating that the principle of the *Silverthorne* case was satisfactorily stated therein.

In *Flagg v. United States* (*supra*) the defendant was arrested; there being no warrant or process of any kind either for arrest or for search issued against him, and his books and papers were carted to the federal building where they remained for several years and where the Government officials worked over them for 18 months, although the defendant applied for their return three days after they were seized. The court said at page 483:

"The question then is reduced to this—can a party be convicted of a crime upon proof procured from books and papers which have been taken from him by force and without a pretense of legal authority?

Will the people be secure in their persons, papers and effects if seizures and searches made without pretense of legality are sustained by the Courts?"

The Court then held at page 486:

*"The return of the defendant's books and papers, after all the information contained therein had been obtained by the prosecuting officers, did not cure the original trespass. The wrong had then been done. The information illegally obtained was in the possession of the United States Attorney whose agents had been working over the papers 'for three long years.' Their return at that time was an idle ceremony. The government officials possessed the 'secondary evidence' and were not concerned about the disposition of the 'primary evidence'." (Italics ours.)*

Thus, this Court by its decision in the *Silverthorne* case (*supra*), citing *Flagg v. U. S.* (*supra*) with approval, rendered inadmissible in addition to all evidence which had been obtained directly by the original wrong doing of the federal authorities, all evidence obtained indirectly from the polluted source.

If, the evidence brought out against the appellant Gottfried herein was construed to have been obtained in violation of the constitutional guarantee of the 4th amendment, the lower court could not justify its admission, for the information obtained from the illegal wire tapping was in the government's hands for a considerable period of time, and the leads thus acquired must have formed

the backbone of the government's case on this second trial; which presumption would follow in line with the Court's statement about "secondary evidence" in *Flagg v. United States* (*supra*). However, this Court declared wire tapping evidence inadmissible, *not because it violated any constitutional guarantee*, but because it was obtained in violation of a United States Statute which prohibited not only interceptions of telephone messages, but also the unauthorized divulgence of their contents. *Nardone v. United States*, 302 U. S. 379. Therefore, a new question is presented: is "secondary" evidence obtained from inadmissible proofs, illegally acquired, but not through the violation of a constitutional guarantee, admissible?

Thus; evidence, inadmissible in federal courts because illegally obtained although competent in all other respects, falls into two groups. First: that which is uncovered in violation of a constitutional guarantee; which apparently includes all unreasonable searches and seizures with the exception of wire tapping, and second: that which is obtained in violation of a Congressional enactment; which seems to include only an unreasonable search by means of wire tapping. At present date this Court has rendered inadmissible all evidence whether "primary" or "secondary", obtained in violation of the 4th amendment, unless later secured from an independent, proper source; also direct "primary" evidence obtained in violation of section 605 (*supra*). However, as yet, there has been no adjudication by this court as to whether "secondary evidence" flowing from primary evidence obtained in violation of a congressional enactment is inadmissible.

It was argued in the *Silverthorne* case (*supra*), that allowing the government to introduce in two steps that which was forbidden to be done in one, referring to an unlawful search, reduces the 4th amendment to a form of words; and, this Court held in its opinion that such was not the law. The same argument can be applied to proof wrongfully uncovered in violation of a congressional enact-

ment. If the government should be allowed in two steps to introduce substantially the same evidence which they were not allowed to introduce in one step, namely: the secondary introduction of matter rendered from wire tapping evidence, then section 605 of the Communications Act would be reduced to nothing more than a form of words. It is respectfully submitted in the light of this Court's decision in the *Nardone* case (*supra*), that such is not the law.

## POINT II.

**A complete investigation should have been granted to determine whether a portion of the Government's evidence was procured through the illegal interception of telephone and telegraph messages since evidence so procured is inadmissible.**

Point I discusses fully the arguments why evidence procured through wrongful wire tapping should be inadmissible.

While the general rule pertains that objection to evidence illegally obtained should be made before trial, and the Court should at that time entertain a preliminary investigation into the source of the evidence, it has also been held by this Court that where the defendant objected promptly upon first notice that the illegally obtained evidence was in the Government's possession, the objection was timely even though not made before trial.

*Gouled v. United States*, 255 U. S. 298.

Of course in the instant case the appellants knew that the Government had had in its possession illegally obtained evidence which had been adjudged inadmissible, but



no preliminary objection was made since it was reasonably assumed that the Government would not attempt to re-use inadmissible evidence; in fact the appellants could not conjecture how the Government intended to prove its case on the second trial; however prompt objection was made as soon as it became apparent that Government witnesses were giving testimony adduced from the illegal "wire tapings" (R., 41, 46).

The trial court however at first refused to entertain the appellants' objections (R., 46), although later it allowed an inquiry (R., 264, 265) which it did not permit to be finished (R., 288, 289), thus prohibiting a collateral inquiry.

Inquiries into the source of evidence are generally prohibited since a procedural rule has been set up by the Courts in criminal cases not to pause and frame a collateral issue to determine how the possession of evidence tendered has been obtained.

*Amos v. United States*, 255 U. S. 313;

*Gouled v. United States*, 255 U. S. 298.

However, in *Gouled v. United States* (*supra*) this Court held that a rule of practice must not be allowed for any technical reason to prevail over a constitutional right. It is probable that any protection afforded an accused or innocent person, by Section 605 (*supra*), may not be construed to be a constitutional right. Thus it can be argued that the rule of procedure as outlined above should not be relaxed, as happened in the instant case, to permit an investigation into the source of the Government's evidence. However, whether involving a constitutional right or not, it is clear that to allow such a procedural rule to shield the source of the Government's evidence, which for the sake of this argument may be construed to be illegal, would reduce Section 605 (*supra*) to a mere form of words; unless Congress intended that the statute should be enforced merely by punishing offenders as the only

means of protecting the secrecy of telephone messages. But; this Court held in *Nardone v. United States* (*supra*), that evidence received in violation of Section 605 (*supra*) was inadmissible in the Federal Courts, thus, construing that it was the intention of the legislature to protect the sender of a telephone message in the same manner as his right to be free from unreasonable searches and seizures is protected under the 4th Amendment.

An analysis of the Constitutional provisions against search and seizure and the prohibition as contained within the Federal Communications Act, 1934, Section 605, reveals that both laws are similar in purpose: the first, to make persons secure in their homes and effects from unreasonable searches; and the second, to make persons secure from unwarranted interferences in their use of the telephone, and other mediums of communication mentioned within the statute. The same arguments which prompted this Court to render inadmissible evidence obtained in violation of the 4th amendment are applicable to invalidate items learned pursuant to violations of Section 605 (*supra*), since Section 605 (*supra*), was enacted to fill an unintentional omission by the framers of the 4th amendment; being the legislation suggested to Congress by this Court in *Olmstead v. United States*, 277 U. S. 438, necessary to outlaw wire tapping evidence.

Thus, while the rights of the appellant herein, to have evidence wrongfully obtained in violation of Section 605 (*supra*) adjudged inadmissible, are found in a Congressional statute and not a constitutional amendment, they are essentially, substantially, and in final effect identical to constitutional rights under the 4th amendment. It is submitted that they should be treated no differently than constitutional rights were treated in *Silverthorne v. United States* (*supra*), *Amos v. United States* (*supra*), and *Gould v. United States* (*supra*).

The Communications Act (*supra*) did not specifically treat on inadmissibility of evidence obtained in violation

of its provisions, leaving that point for judicial interpretation. However this Court in *Nardone v. United States* (*supra*) did interpret the statute to render the illegal evidence inadmissible. Counsel respectfully urges this Honorable Court not to rob that decision of the vital force which it embodies for the preservation of the freedom and democracy by allowing its safeguards to be circumvented merely by rehashing, and reconstructing illegal evidence, so that it appears to be evidence legally obtained.

### POINT III.

**Assuming that the right to be free from unwarranted interferences in the use of the telephone is not a constitutional right it must be treated nevertheless in the same manner as a constitutional right in view of Article 6, Clause 2 of the Constitution.**

Under the decision in *Nardone v. United States* (*supra*) every person has the right to be free from unauthorized interferences when he uses the telephone; the secrecy of his message being protected to the extent even of being kept inviolable in the Federal Courts. It is not argued that this decision based on Section 605 of the Communications Act of 1934 grants a constitutional right, but it is respectfully urged by the appellants that whether a constitutional right or not it is to be treated in the same manner as a constitutional right since both rights are incident to the Supreme Law of the Land as defined by Article 6, Clause 2 of the Constitution (*supra*).

This argument does not go so far as to say that a later act of Congress takes precedence over a constitutional provision or that an act of Congress can stand which conflicts with a constitutional provision, since both illustrations would clearly be unconstitutional and invalid. In that sense the constitution may be called higher law. Yet, where there is a right granted by the Constitution and a

similar, unconflicting right granted by Congress, according to Article 6, Clause 2, both are equally the Supreme Law of the land. Thus, when the Constitution grants a right to persons that they shall be free from unreasonable searches and seizures and Congress grants a right to persons to be secure in their use of the telephone, there can be no reason for the one right to be greater than the other since both are to be equally considered the Supreme Law of the Land.

It is therefore respectfully urged that the cases cited in support of arguments in Points I and II of this brief which refer to "Constitutional Rights" should be applied with equal force and effect to rights granted by Congress in a constitutional exercise of its authority, since Article 6, Clause 2 of the Constitution, makes no distinction as to rights, whether granted under the Constitution, or by Congress, or by a Treaty as all three classes are designated by that clause as the Supreme Law of the Land without qualification.

Hence, constitutional provisions, congressional statutes, and treaties, when properly made, grant rights all of which are on an equal footing, and if a case holds, as does *Gouled v. United States (supra)*, that a rule of practice must not be allowed for any technical reason to prevail over a constitutional right, then the same holds true also for a right granted by Congress or by a Treaty.

### **CONCLUSION.**

***For the reasons advanced, it is submitted that the judgment of conviction of the Court below should be reversed.***

Respectfully submitted,

LOUIS HALL,  
Attorney for Appellant,  
Robert Gottfried.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM—1939.

No. 240.

FRANK CARMINE NARDONE, NATHAN W.  
HOFFMAN and ROBERT GOTTFRIED,

*Appellants,*

AGAINST

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT.

**BRIEF ON BEHALF OF NATHAN W.  
HOFFMAN, APPELLANT.**

Jesse Clinck  
J. BERTRAM WEGMAN,  
*Attorney for Appellant,*  
*Nathan W. Hoffman,*  
No. Sixty Wall Street,  
Manhattan Borough,  
New York City.



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**Supreme Court of the United States**

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No. 240.

FRANK CARMINE NARDONE, NATHAN  
W. HOFFMAN and ROBERT GOTT-  
FRIED,

*Appellants,*

AGAINST

UNITED STATES OF AMERICA,  
*Respondent.*

**On Writ of Certiorari to United States Circuit  
Court of Appeals for the Second Circuit,  
Brief of Appellant, Hoffman.**

**Opinions Below.**

The District Court (Southern District of New York, CLANCY, J.) did not render an opinion. The opinion of the Circuit Court of Appeals is reported in 106 Fed. (2nd) 41.

**Jurisdiction.**

The judgment of the Circuit Court of Appeals was entered on July 20, 1939. The petition for certiorari was filed on the same day and was granted on October 10, 1939.

Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### **Questions Presented.**

The Court in granting the writ limited it to these questions:

1. Whether the Trial Court correctly disposed of petitioner's claim that a portion of the respondent's evidence was procured through the illegal interception of telephone and telegraph messages; and
2. "The question of the propriety of a preliminary inquiry to ascertain that fact."

Under Section 240 (a) of the Judicial Code, the Court is not limited to a review of those questions certified when the petition for the writ was granted (*Olmstead v. U. S.*, 277 U. S. 488). Accordingly, on behalf of the appellant Hoffman, it is respectfully submitted that a further question is worthy of the consideration of the Court. That question is:

3. Whether the respondent proved a *prima facie* case on any count of the indictment against appellant Hoffman.

### **The Statute Involved.**

Section 605, Title 47, U. S. C. A., 48 Stat. 1103 (June 19, 1934).

No person receiving or assisting in receiving or transmitting or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect

or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing offices of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information as so obtained shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information herein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

### **Statement.**

These appellants, other than appellant Hoffman who was named as a conspirator but not a defendant, were first indicted on May 15, 1936, charged with smuggling of alcohol into the Port of New York on March 17, 1936, the



subsequent concealment of that alcohol, and conspiracy to effect these substantive crimes. The judgment of conviction was reversed (302 U. S. 379) because evidence was admitted disclosing the contents of certain telephone conversations intercepted by Government agents acting, this Court held, in violation of the provisions of Section 605 of the Communications Act of 1934. A superseding indictment was filed on July 7, 1938, identical in all respects with the original indictment, except for the inclusion of the appellant Hoffman as a defendant. The trial jury rendered a verdict of guilty on all counts as against all defendants, including these three appellants, on March 23, 1939.

A sentence of imprisonment was imposed on each appellant. Bail pending appeal to the Circuit Court of Appeals was denied by the District Court and by the Circuit Court of Appeals, but when the judgment was affirmed by the Circuit Court of Appeals on July 20, 1939 (*U. S. v. Nardone*, 106 Fed. 2nd, 41) that Court, of its own motion, granted bail conditioned upon the filing of a petition for a writ of certiorari to this Court (106 Fed. 2nd, at p. 44).

### **The Trial.**

The indictment charged and the Government attempted to prove that appellants, among others, formed a plan in January of 1935 whereby they would cause alcohol manufactured in Belgium to be transported by a freighter, the *Isabel H*, to points relatively near the eastern coast of the United States, and to cause that alcohol thereafter to be transferred to smaller vessels, the *Pronto* and the *Southern Sword*, to be smuggled into the United States. It was alleged that a cargo of alcohol was thus transferred to the *Southern Sword*, then in radio-communication with the co-conspirator Geiger, allegedly an employee of the defendants, and under the command of the defendant Brown. The alcohol is said to have been transferred from

the *Southern Sword* to a vessel owned by one Mathiasen, and by that vessel to have been brought into the Port of New York on March 17, 1936.

In the first trial, the Government called as witnesses agents who had "tapped" telephones used by the defendants. These witnesses were permitted to testify to the contents of those conversations. That was held reversible error.

From December 22, 1935 to the end of March, 1936, three Government agents devoted all their time to listening in on telephones used by the defendants, and during that period, overheard no less than 650 conversations. The Chief Investigator stated during the course of the abortive hearing permitted by the Trial Judge that the Government had a suspicion that members of an unidentified group known vaguely as "The International Ring", and suspected of smuggling alcohol, were congregating in the lobby of the Hotel Astor in New York City and using the public telephones there. The very identity of the defendants themselves was revealed only by the interceptions. The Government's agents learned of the proposed acts which are the crimes alleged in the indictment only by these same interceptions.

At the second trial, now under review here, these witnesses were not called to testify but use was made of these interceptions in the preparation by the Government for the second trial, and was the whole basis of the Government's proof during that trial. The first witness called was the radio operator, GEORGE GEIGER. He had not been called as a witness on the first trial; the Government there proved through the intercepting agents, the contents of conversations to which he had been a party. The defendants immediately objected to questions addressed to Geiger to elicit testimony of these conversations and moved to strike out that testimony upon the ground that it

"was obtained by the unlawful interception of telephone and telegraph messages, by the process com-

monly known as wire-tapping, in violation of Section 605 of the Federal Communications Act, that the existence of the witness, the fact that he was a witness to some of the transactions and the relations between the defendants and of the witness with the defendants and other persons alleged to be cooperating with them was revealed by the unlawful interceptions of telephone and telegram messages and that the Government used the records of these interceptions in preparation for this trial and for obtaining other witnesses and other evidence against the defendants.' The Court then announced that this matter would be taken up later in the trial." (Record, p. 46.)

This objection being overruled, they offered to prove that the testimony was the direct result of the interception (Record, pp. 49, 55). The Court denied the application and stated that the defendants "should wait" (Record, p. 55). The same objection and the same offer were made in respect of the testimony of the witness Kleb, a co-conspirator. But the Court again denied the defendants the opportunity they sought (Record, pp. 86; 94). So, with the witnesses Steinfeldt (Record, p. 142) Lancaster, Strumill and others (Record, p. 301). Upon the conclusion of the Government's case, the Court permitted the defendants to begin an inquiry for the purpose of demonstrating the immediate connection between the telephone interceptions and the procurement by the Government of the testimony of these witnesses. The attitude of the Court was then explained by the statement that the offer could not properly have been made, or the question even raised, until all of the Government's proof was in (Record, p. 266). The hearing which then followed was marked by the growing impatience on the part of the Trial Judge with the effort to demonstrate that connection. As the Circuit Court of Appeals said:

"In substance, the judge stopped the inquiry,

• • •

The Court directed defendants' counsel to do the impossible. He said he would hear only attacks upon specific items of evidence, but barred defense counsel from making the preliminary investigation necessary to show that specific items had been obtained solely by use of the interceptions.

Thus, the question here is not whether defense counsel were successful in discharging the burden they desired to assume, for they were never given that opportunity. But the probability of success in discharging that burden may be judged by comparing the record of the first trial with this record. Upon this trial, the Government called as witnesses three persons named in both indictments as conspirators, not produced as witnesses at the first trial. They are Geiger, Kleb and Lancaster. Their testimony is the essence of the Government's case. Each admitted his participation in the alleged conspiracy, and stated that at the direction of some of the defendants, each participated in acts constituting the substantive crimes.

A striking example of the use of the taps may be found in the fact that the witness Steinfeldt was called in the second trial, but not in the first. He was the owner of a boat which the Government contended the defendants sought to use for the transportation of smuggled alcohol. He was not called as a witness in the first trial, because during that trial, the Government directly produced the record of the telephone conversation of one of the defendants with him. Obviously, his identity was learned through that interception. Equally obviously, the Government prepared its case through the use of that interception, since it was able to find him, communicate with him, review his testimony, and call him as a witness, as a result and only as a result of the interception. The testimony of the witnesses Nillson and Strumill belongs in precisely

the same category. They had been employed by a machinery company; the Government desired to prove that some of the defendants directed necessary machinery parts to be shipped from New York to Yarmouth. In the first trial, this was done by the direct use of the interceptions. On this trial, the witnesses whose identity was learned through the interceptions were called to testify to those same conversations in which they had participated.

### **Summary of Argument.**

The statute forbids the use of information obtained through the interception of telephone messages. Appellants could not have anticipated such use in violation of the statute. Accordingly, appellants' offer to prove the immediate relationship between respondent's proof and the knowledge gained through the interceptions was seasonably made at the outset of the trial. This application should have been granted; in refusing it, the Trial Court precluded itself from determining, as it should have, whether the respondent had proven a vital part of its case by improper use of the intercepted messages. In any event, the respondent failed to prove a *prima facie* case against the appellant Hoffman.

### **POINT I.**

**Respondent violated the provisions of Section 605 of the Federal Communications Act by the use it made of the intercepted messages.**

In *Nardone v. U. S.*, 302 U. S. 379, the Court held on the authority of what may be called Subdivision 2 of Section 605 of the Federal Communications Act, that an agent who had intercepted an interstate telephone communication could not thereafter take the stand as a witness and there recite the contents of that message, because



that act was tantamount to divulging the message in violation of the statute (302 U. S. 382). On that appeal, there was no occasion for the Court to consider the Fourth Subdivision of the Section which not only prohibits any person from divulging or publishing the contents of such a message, but also provides that

“no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.” (Italics ours.)

The words of the statute are plain and unambiguous. The prohibition against any use of the intercepted messages extends to and includes the Sovereign. *Nardone v. U. S.*, 302 U. S. 384. Evidence illegally obtained cannot be used directly or indirectly. No use can be made of it. “The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.” *Silverthorne v. U. S.*, 251 U. S. 385, at 391.

In the *Silverthorne* case, it was held that when evidence had been illegally procured, it could not be used even for the purpose of drawing a subpoena. In *Flagg v. U. S.*, 233 Fed. 481, it was held that evidence illegally pro-

cured could not be used as a basis for the preparation of the Government's case. There, the evidence illegally seized was not offered as part of the Government's proof, but the Court reversed the conviction because it seemed that such evidence had served as a basis for procuring secondary evidence and in the preparation for the trial. That ruling was approved by this Court in the *Silverthorne* opinion. *Rogers v. U. S.*, 97 Fed. 2nd 691, is a more recent example of the application of the same principle. If documents illegally obtained reveal the existence of companion counterparts, the latter become inadmissible. *Cf., Gouled v. U. S.*, 255 U. S. 298.

That the ban extends to all possible uses is illustrated by *Agnello v. U. S.*, 269 U. S. 20. Here the use of illegally obtained evidence not for the purpose of proving the Government's case, but in an effort to contradict a defendant on cross-examination, was held reversible error.

Obviously, if the principle of these cases applies, then the respondent in this case made improper use of the information gained by the telephone interceptions. But the Circuit Court of Appeals suggested, and the respondent may be expected to argue, that the prohibition against the indirect use of evidence illegally obtained extends only to those cases where the illegality consisted of the violation of rights secured by the Fourth Amendment. It is respectfully suggested that that argument is predicated upon a fundamental misconception. Section 605 of the Federal Communications Act is as much a part of the law of the land as is any provision of the Constitution itself, and for that the Constitution is authority. *Article VI, Clause 2, Federal Constitution*. There is implicit in the opinion below the suggestion that a court will pause to investigate the validity of the use of evidence when it is alleged that the manner of its discovery violated the Constitution, but that if evidence was procured by violating a lesser authority, as possibly a statute, such investigation will not be made. This Court has never pronounced such

a rule, and certainly the distinction would not be consistent with the pronouncement of Clause 2 of Article VI of the Constitution. This Court has said that where investigation as to the source is necessary in order to prevent the rights assured by the Fourth and Fifth Amendments from degenerating into a form of words, such investigation must be made. The rights assured by Section 605 of the Federal Communications Act stand upon the same footing and are entitled to the same security, and can no sooner be permitted to degenerate into a form of words than the rights secured by the Fourth and Fifth Amendments.

Finally, it is said in the opinion below that appellants had no right to the opportunity for the investigation they sought, because the holding of this Court in *Olmstead v. U. S.*, 277 U. S. 438, denied them such a right. True, the majority opinion in that case did suggest that under the common law, evidence illegally obtained was not inadmissible for that reason. But the *Olmstead* case dealt with an entirely different situation. There the illegality in the procurement of the evidence rested upon a state statute which made wire-tapping a crime but which did not prohibit the use of the information thus obtained. Here, a federal statute prohibits any use of that information. The majority of the Court thought that *ex parte Jackson*, 96 U. S. 727, which held that seizure and inspection of mailed matter in violation of federal prohibition constituted an invasion of the rights secured by the Fourth Amendment, could be distinguished because the right to secrecy of mailed matter was protected by federal statute whereas the right to equal secrecy for telephonic communication was then not statutory. There is no longer that distinction. There is a closer analogy to the protection of the Fourth Amendment in the privacy sanctioned now by statute for oral communication by electric wire than there is to a paper, possession of which is completely surrendered to the Postal Authorities.

The Circuit Court of Appeals seemed to think necessary to a reversal here that there be a repudiation of the doctrine of the *Olmstead* case. On the contrary, it is submitted that under the authority of the majority opinion in that very case, telephone messages are now entitled to all of the rights of secrecy afforded the mails by the rule of *Ex parte Jackson, supra*, as reiterated in *Olmstead v. U. S., supra*. Mr. Justice BRANDEIS dissented (being joined in dissent by Mr. Justices STONE, BUTLER and HOLMES) because he thought no statute was needed as a basis for prescribing such an invasion of privacy. But now there is a statute. A *fortiori* what he then said ought now control.

## POINT II.

**The Trial Court should have permitted appellants to make a preliminary inquiry into the use made by respondent of intercepted telephone messages, and the request by appellants for such an opportunity was seasonably made at the outset of the trial.**

This Court has firmly held to the rule that the Government is not permitted by indirection to violate rights secured by the Constitution. The office of the preliminary inquiry has been to ascertain whether the Government had invaded constitutional rights. Rights secured by statute should be entitled to the same protection. Such a preliminary inquiry seems equally appropriate for demonstration of an indirect violation of the provisions of the Federal Communications Act.

It has not been, but it may be, questioned whether appellants made timely application for such preliminary inquiry. Since *Weekes v. U. S.*, 245 U. S. 618, it has been held that where evidence was procured in a manner violative of the Fourth Amendment, and the defendant has knowledge of such seizure, and has opportunity to dispute



the constitutionality of the search, he will be estopped from protesting against the admissibility of the evidence unless he apply for its suppression prior to the beginning of the trial: But this "rule of practice must not be allowed for any technical reason to prevail over a constitutional right". *Gouled v. U. S., supra.*

In *Amos v. U. S.*, 205 U. S. 313, it was held that the application was not belated if made after the impaneling of the jury, in a case where the evidence had been seized in obvious disregard of the constitutional protection. In *Gouled v. U. S., supra*, it was held that the application was timely made at the trial, where the defendant could not have made it earlier since the documents had been taken by stealth and without the defendant's knowledge. In the instant case, appellants made the application as soon as, at the beginning of the trial, they had the first intimation of the respondent's intended use of information gained from intercepted telephone conversations. A determination that the application made at that time was not diligently made must hold that the appellants were under a duty to anticipate a violation of the statute by the Government. On the contrary, they were entitled to proceed on the assumption that the Government would itself obey the law. Cf., *Berger v. U. S.*, 295 U. S. 78. Particularly so when in the very case in which this Court had enunciated the applicability of the statute.

### POINT III.

**Respondent failed to prove a *prima facie* case under any of the counts of the indictment as against appellant Hoffman.**

It is earnestly contended on behalf of the appellant Hoffman that as against him, respondent failed to prove a *prima facie* case. Counsel is aware that that matter is beyond the limitations prescribed when the writ was



granted. Yet since this Court has the right, under Section 240 (a) of the Judicial Code as amended, to take cognizance of the argument if upon the whole case it should appear to the Court that the contentions here advanced merit consideration, the point is presented for such attention as to this Court may seem proper.

**This Is the Proof Adduced Against Hoffman:**

He was seen in the presence of the conspirators on many occasions by the five witnesses Weiss (fols. 294, 295, 298, 302) Parrot (fols. 431, 440, 441) Martin (fols. 472, 474, 478, 494-498) Velez (fols. 540, 640-646) and Dunne (fols. 751-754). Not one of these witnesses was able to recall a single statement made by Hoffman on any of these occasions. So far as these witnesses were concerned, he was merely a by-stander.

Geiger said that LeVeque told Geiger that Hoffman was a partner in the smuggling enterprise, but that Geiger was not to take orders from Hoffman (fol. 100). Geiger was unable to state that Hoffman was present on that occasion (fol. 98). Appellants' motion to strike this testimony was denied and an exception noted (fol. 907).

Lancaster said that on an occasion in December, 1934, which is prior to the inception of the conspiracy as alleged in the indictment, or January, 1935 (the witness was unable to say which date was correct), he, Lancaster, was then in the employ of one Kleb. Lancaster was then working on the boat, the *Menalolo*, and had assisted in bringing in a cargo of smuggled alcohol at a point on the coast of Long Island. On that occasion, said Lancaster, while the alcohol was being moved from the boat to a truck, Hoffman gave Lancaster money with which to buy gasoline for the truck (fol. 308). The incident is anterior to and unconnected with the substantive crimes charged by the indictment. Decision on the motion to strike this evidence was reserved and the motion thereafter denied

and an exception noted (fol. 908). The rule was made upon the theory that the evidence was admissible as indicative of the past commission of a similar crime. Incidentally, the record shows that the *Monalolo* sank early in 1935. It was not one of the boats like the *Pronto* or the *Southern Sword* which had allegedly been used in the movements of alcohol as charged by the indictment. More important is the fact that the Circuit Court of Appeals completely misapprehended the significance of the incident. The Circuit Court of Appeals by its opinion indicates that it thought that the boat that Lancaster was referring to was the *Pronto*. Had it been the *Pronto*, the inference of a close connection between Hoffman and the other defendants might have been justified.

There is thus nothing in the record to justify the conviction of Hoffman on the two substantive counts. The Circuit Court of Appeals said:

"There was plainly enough to support a verdict against all these men—certainly as to the conspiracy."

No mention was made of the sufficiency of the proof with respect to the substantive counts.

But it is earnestly submitted that even with respect to conspiracy there was a failure of proof as against Hoffman even on the conspiracy count, when the record is analyzed. If it is to be inferred that because he was in the company of smugglers he must therefore have known of their smuggling activities, the knowledge so gained would not make him a conspirator (*Dellaro v. U. S.*, 99 Fed. 2nd 781).

Geiger's testimony, if admissible in spite of its hearsay character, is not an adequate substitute for proof of Hoffman's participation in the conspiracy because in any event, it was inadmissible in the absence of independent proof of Hoffman's participation, and because participation of a third person cannot be proved by a declaration of one

conspirator to another, (*Thomas v. U. S.*, 57 Fed., 2nd 1039).

What Lancaster said referred to a transaction independent of the crimes charged. There is a conflict in the authorities as to its admissibility in any event. *Heike v. U. S.*, 227 U. S. 131; but see *Standard Oil Co. v. U. S.*, 221 U. S. 1; *Lancaster v. U. S.*, 39 Fed. 2nd 30; *Vendetti v. U. S.*, 27 Fed. 2nd, 856. Even those authorities which permit the introduction of this type of testimony do so in spite of the acknowledgment that the proof is not in support of the accusation. Perhaps the jury should have been permitted to hear that in December, 1934, or January, 1935, long before the commission of the crimes charged, Hoffman participated in some way in a different smuggling transaction. But that proof by itself, or even cumulatively, when taken together with proof of Hoffman's association with the other defendants herein and proof that one defendant told another that Hoffman was a participant, is insufficient to support the conspiracy count.

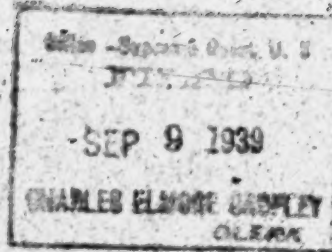
It is respectfully submitted that the Government failed to prove that Hoffman participated in the commission of the substantive crimes; or that he was a party to the conspiracy alleged in the indictment. For this reason, the Court erred in denying his motions to dismiss at the conclusion of the Government's case and at the conclusion of the entire case, and for this reason the judgment should be reversed.

Respectfully submitted,

J. BERTRAM WEGMAN,  
Attorney for Appellant,  
Hoffman.



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No. 240

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*In the Supreme Court of the United States*

OCTOBER TERM, 1939

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FRANK CARBINE NARDONE, NATHAN W. HOFFMAN,  
AND ROBERT GOTTFRIED, PETITIONERS

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

No opinion was rendered by the District Court of the United States for the Southern District of New York. The opinion of the Circuit Court of Appeals (R. 358-363) has not yet been reported.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 28, 1939 (R. 364). The petition for a writ of certiorari was filed on the same day. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by

the Act of February 13, 1925. See also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

#### QUESTION PRESENTED

Whether the trial court committed reversible error in limiting the petitioners' inquiry into the source of Government evidence, alleged to have been obtained as a result of the unlawful interception of certain telephone communications.

#### STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605), provides that—

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no

person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. [Italics supplied.]

#### STATEMENT

Petitioners, together with certain other defendants who did not appeal to the Circuit Court of Appeals, were convicted in the United States Dis-

trict Court for the Southern District of New York on an indictment<sup>1</sup> (R. 10-21) charging in two counts the smuggling and concealing of alcohol, in violation of the Tariff Act of 1930 (U. S. C., Title 19, Sec. 1593 (a) and (b)), and in one count a conspiracy to smuggle and conceal alcohol in violation of Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88). A verdict of guilty on all counts was returned on March 23, 1939 (R. 7, 326-327). On March 24, 1939, the petitioners were sentenced as follows (R. 7-8, 328-334): Frank C. Nardone to a term of two years on each count, the sentences to run concurrently, and a fine of \$3,000; Nathan W. Hoffman to a term of two years on each count, the sentences to run concurrently, and a fine of \$2,500; Robert Gottfried to a term of one year and one day on each count, the sentences to run concurrently.

During the trial several offers were made by the defendants to prove that the testimony of various Government witnesses, nineteen in all (R. 279), presented evidence which was alleged to have been obtained as a result of the unlawful interception of telephone messages. These offers of proof, which were accompanied by motions to strike such testimony (R. 46, 94, 138, 142, 157), were denied over objection and exception.

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<sup>1</sup> The judgments of conviction of petitioners Frank C. Nardone and Robert Gottfried under a previous similar indictment (in which petitioner Nathan W. Hoffman was not named as a defendant) were reversed by this Court in *Nardone v. United States*, 302 U. S. 379, because of the introduction in evidence by the Government of certain intercepted interstate telephone communications.



At the instance of the defendants the trial court, upon conclusion of the Government's case, conducted an inquiry for the purpose of ascertaining whether any of the Government's evidence resulted from wire tapping (R. 265-300). With this end in view, the defendants, out of the presence of the jury (R. 265), called as their first witness one Joseph A. Kozac (R. 266), a Government agent who had testified as to the contents of certain intercepted messages at the previous trial.<sup>2</sup> The substance of Kozac's testimony was to the effect that he had not known of the existence of certain of the defendants prior to the interception of the telephone communications. During Kozac's examination, defendants were called upon and admonished by the court to attack specific portions of the evidence (R. 279) and to demonstrate that the testimony of any particular witness, or any other evidence, was obtained exclusively from an illegal source (R. 286). The court assured the defendants it would hear them upon any testimony which would establish that specific evidence was so obtained (R. 279, 286). The court told defendants they had no right "to go fishing" (R. 285) and finally said (R. 286):

The Court, after listening to one witness, concludes as matter of fact that this testimony is incoherent and not conclusive; that the Court now offers to hear an attack on

<sup>2</sup> See footnote 1, *supra*, p. 4.

any special part of the testimony that any attorney in the case believes he can fairly attack, as believing it came from no other source, and in default of that I rule the discovery of the complaint has nothing to do with the evidence.

After the court rejected defendant's offer of evidence as to specific intercepted communications, the Government was permitted to call one William E. Dunigan (R. 290-300), supervisor of the investigation in the instant case, whose testimony was in substance that various telegrams and money orders introduced in evidence were not obtained as a result of wire tapping (R. 290); that much of the information he procured concerning the case was revealed to him by informers both prior to the installation of the wire taps and during the time the "taps" were being taken (R. 290, 292, 295); that other material evidence did not result from the intercepted messages (R. 291, 293); that it was after March 20, 1936 (when the tapping was apparently discontinued, see R. 266), that the defendants' connection with the "Southern Sword" (one of the smuggling vessels) was established without reference to the wire taps; and that certain witnesses, members of the crew of the "Southern Sword", were unknown to him prior to the discontinuation of the tapping (R. 293). The witness also stated that if the "taps" had been the only information available to the Government there would never have been a seizure in the case (R. 295).

Upon appeal to the Circuit Court of Appeals for the Second Circuit the judgments of conviction were unanimously affirmed (R. 358-364).

#### ARGUMENT

Petitioners' primary contention<sup>3</sup> is that reversible error resulted from the trial court's refusal to allow a continuance of their inquiry into the source of Government evidence, alleged to have been obtained as the result of the unlawful interception of certain telephone communications which were introduced at the former trial,<sup>4</sup> and in denying, over their objection and exception, their motion to strike such evidence.<sup>5</sup> In effect the petitioners contend that the action of the trial court, in rejecting their offer of proof as to the extent to which the Government's case was the fruit of unlawfully intercepted messages, denied a full and

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<sup>3</sup> Petitioner Nardone presents another contention in the petition for certiorari (p. 8) which is not argued in the supporting brief. It is asserted that it was error to have allowed one Murphy, a sailor on the vessel "Isabel H", which was engaged in the illicit activities, to testify as to a paper, shown to him by the ship's wireless operator, purporting to be a list of the owners of the "Isabel H" which contained the name of petitioner Nardone.

The point was adequately dealt with in the opinion of the Circuit Court of Appeals (R. 361) and, in any event, as was pointed out by that court, "no great harm is done by the testimony, as Nardone was amply connected [with the conspiracy] without it." It is obvious that the question is not one which would warrant the granting of a writ of certiorari.

<sup>4</sup> See footnote 1, *supra*, p. 4. None of the intercepted messages admitted at the former trial was, however, introduced in evidence at the trial in the instant case.

complete inquiry into the question of the admissibility of the Government's evidence. Without waiving any contention as to this point, we submit that it is unnecessary for this Court to consider the petitioners' contention since, even if it had been established that the Government's case was in part predicated upon leads obtained through wire tapping, this fact would not have entitled the petitioners to a reversal of their convictions.<sup>8</sup>

The Circuit Court of Appeals held that it was unnecessary to decide such questions as whether the unlawful interceptions tainted all other evidence procured through them, whether the burden rested upon the accused or the prosecution to show to what the taint extended, how the inquiry should be conducted, and whether it was too late to leave the inquiry until the trial. This was because, the court said, under the decision of this Court in *Olmstead v. United States*, 277 U. S. 438, which it still regarded as the law, telephone tapping is not in itself an unlawful search under the Fourth Amend-

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<sup>8</sup> For the same reason we deem it unnecessary in this brief, without waiving any contentions as to them, to consider the questions whether the petitioners should have initiated the inquiry attempted by them prior to trial and whether, assuming that the petitioners were granted a full and fair inquiry, they established that any of the Government's evidence was made accessible by reason of the wire tapping, as well as the questions suggested in the petition for writ of certiorari (Pet. 7-8) as to whether intrastate messages are under the ban of Section 605 of the Federal Communications Act and whether it is incumbent upon defendants, objecting to evidence, to show that the messages intercepted were of an interstate character.

ment, with the result that no other consequence could attach than would attend the acquisition of evidence by means of an ordinary crime; i. e., "the common law \* \* \* prevails, and the court will not look beyond the character of the evidence itself." The court found nothing in the recent decision of this Court in *Nardone v. United States*, 302 U.S. 379, which is inconsistent with the holding in the *Olmstead* case, since in the *Nardone* case this Court decided only that Section 605 of the Federal Communications Act forbade the introduction in evidence of interstate telephone communications intercepted by Federal officers. The court concluded that, although the statute rendered inadmissible the intercepted messages themselves, it did not also make incompetent any evidence which had become accessible by reason of the wire tapping, and that, consequently, the defendants in the case at bar had no right to a discovery of the source of the Government's evidence.

The court also expressed the view that if the *Olmstead* case should be deemed to have been overruled, it might possibly be that not only the actual talk overheard would be incompetent but also any evidence obtained by means of the interceptions, although there were no decisions which, in its opinion, extended the constitutional doctrine to this extent. The court felt, however, because of the virtual impossibility of defendants establishing that the Government's evidence was tainted by reason of the unlawful tapping, unless there is a complete disclosure of its case by the Government, with



the attendant embarrassment to the prosecution resulting therefrom, that these considerations may well result in qualifying any such supposed doctrine by restricting incompetency to the actual communications unlawfully intercepted.

1. It seems clear, we submit, that if the *Olmstead* decision is still the law and has not been overruled by the *Nardone* decision, there is no constitutional prohibition against wire tapping by federal officers and, consequently, there can be no constitutional prohibition against the utilization in a Federal criminal prosecution of evidence obtained through leads resulting from wire tapping.\* So far as such evidence is concerned, it stands upon the same plane as any other evidence which may have been obtained as the result of an illegal or criminal act not amounting to a violation of the Fourth Amendment.\* It is well settled, as was pointed out in the *Olmstead* case (p. 467), that evidence thus obtained is not inadmissible; that the courts will not take notice of the manner in which the evidence may have been obtained. All that the *Nardone* decision held was that Section 605 of the Federal Communications Act prohibited Federal officers from divulging in court the contents of interstate telephone communications which they had intercepted. In the instant case there was admittedly

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\*For present purposes it is assumed that not only the divulging but also the interception of an interstate telephone communication is prohibited by Section 605 of the Federal Communications Act and made a crime by Section 501 of that Act, (U. S. C., Title 47, Sec. 501).

no divulging in court of the contents of any communication obtained through wire tapping. There is nothing in the *Nardone* decision, or in the Federal Communications Act itself, which declares inadmissible evidence obtained through leads resulting from wire tapping. It follows, therefore, that petitioners were not entitled to a discovery of the source of the Government's evidence.

2. Even if the *Olmstead* case may be treated as having been overruled and wiretapping considered as forbidden by the Fourth Amendment, or even if, as the petitioners seem to contend, Section 605 of the Federal Communications Act may be deemed to afford a protection as broad as would be that of the Fourth and Fifth Amendments, we submit that the petition for writ of certiorari should, nevertheless, be denied. The petitioners cite no case which goes to the extent of holding that not only the illegally seized evidence itself is inadmissible but also that evidence obtained as the result of leads arising from the illegally seized evidence is incompetent. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, strongly relied upon by the petitioners, certainly does not so hold. There the question presented was simply whether a defendant would be compelled by subpoena to produce before a grand jury documentary evidence knowledge of the existence of which had been acquired through a previous unlawful search and seizure. It is apparent therefore that the case was concerned only with the very evidence which had itself

been obtained, except for its physical custody, through the unlawful search and seizure.

There is, however, we submit, a complete analogy in the case of confessions. It has long been settled that even though an involuntary confession is not admissible, the facts and information discovered in consequence of such a confession are not incompetent. *Wigmore on Evidence*, 2d ed., Sec. 859, and cases cited.

It should also be pointed out that while in many cases evidence obtained by illegal search and seizure has been ordered suppressed or excluded, there is, so far as we are aware, no case in which a conviction has been set at naught because the court was not satisfied that the Government had proved its case by evidence wholly independent of leads obtained from the illegally seized evidence.

Moreover, the court below has succinctly pointed out very cogent reasons making against the contention urged by the petitioners. The court clearly shows that if the privilege of an accused extends beyond the introduction of the intercepted communications themselves, there is no practical way in which the accused can avail himself of this privilege other than by a complete discovery of how the prosecution prepared its case. Obviously, however, to require such a disclosure would often hopelessly handicap the prosecution and might, indeed, confer complete immunity upon a criminal because of the initial mistake of a law enforcement officer—even the lowest subordinate.

For the reasons stated, we submit that the petitioners were not entitled to any inquiry into the source of the Government's evidence. It follows, therefore, that the trial court did not commit reversible error in limiting the inquiry which the petitioners attempted in the instant case.

#### CONCLUSION

The case was correctly decided below and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

ROBERT H. JACKSON,  
*Solicitor General.*

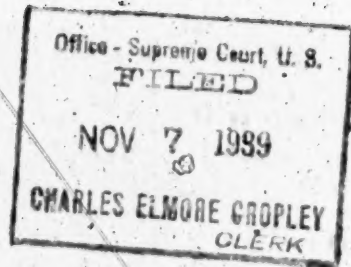
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SEPTEMBER 1939.

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No. 240

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1939

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No. 240

FRANK CARMINE NARDONE, NATHAN W. HOFFMAN,  
AND ROBERT GOTTFRIED, PETITIONERS

v.

UNITED STATES OF AMERICA

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-  
CUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

---

BRIEF FOR THE UNITED STATES

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## **OPINION BELOW**

No opinion was rendered by the District Court of the United States for the Southern District of New York. The opinion of the Circuit Court of Appeals (R. 358-363) is reported in 106 F. (2d) 41.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on July 28, 1939 (R. 364). The petition for a writ of certiorari was filed July 28, 1939, and granted October 9, 1939. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.



See also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

#### QUESTION PRESENTED

This Court in granting the petition for writ of certiorari limited its review "to the question whether the trial court correctly disposed of petitioners' claim that a portion of the respondent's evidence was procured through the illegal interception of telephone and telegraph messages and the question of the propriety of a preliminary inquiry to ascertain that fact."

#### STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605), provides that—

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and

no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

#### STATEMENT

Petitioners, together with certain other defendants, were convicted in the United States District Court for the Southern District of New York on an indictment (R. 10-21) charging in two counts the smuggling and concealing of alcohol in violation of the Tariff Act of 1930 (U. S. C., Title 19, Sec. 1593 (a) and (b)),

and in the third count a conspiracy to smuggle and conceal alcohol in violation of Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88). A verdict of guilty on all counts was returned on March 23, 1939 (R. 7, 326-327). On March 24, 1939, the petitioners were sentenced as follows (R. 7-8, 328-334): Frank C. Nardone to a term of two years on each count, to run concurrently, and a fine of \$3,000; Nathan W. Hoffman to a term of two years on each count, to run concurrently, and a fine of \$2,500; Robert Gottfried to a term of one year and one day on each count, to run concurrently.

Upon appeal to the Circuit Court of Appeals for the Second Circuit by the petitioners the judgments of conviction were unanimously affirmed (R. 358-364).

The outline of the conspiracy as developed by the Government's testimony at the trial was as follows: Early in 1935 one William Kleb was operating a rum-running boat the "Monololo," out of Freeport, Long Island (R. 60, 102). Adrian Van Austin and Floyd Lancaster were members of the crew (R. 102) and petitioners Hoffman and Nardone were interested in the operation (R. 103-104). The "Monololo" sank in January 1935, and the crew was picked up and identified by New York State Troopers (R. 102, 296-297). Kleb transferred Lancaster to another rum-running vessel called the "Ganiff" (R. 103). In July 1935, Kleb's operation was merged with another bootlegging conspiracy theretofore operated by co-conspirators LeVeque and Bert

Erickson (R. 104). LeVeque and Erickson operated a vessel known as the "Isabel H" under the command of one Ducose, and Lancaster was transferred to this boat (R. 67, 104). Later Lancaster and Van Austin were shifted to another of LeVeque's boats, the "Pronto." The "Isabel H" was used as the off-shore boat; the "Pronto" was used to bring the liquor to shore. On October 6, 1935, the "Pronto" was rammed by the Coast Guard Cutter "Argo" which had been trailing it at least as early as September 9 (R. 117, 118). While the "Pronto" was being repaired, meetings relative to rum-running operations were held at the Hotel Astor and the Normandie Restaurant in New York. These meetings were attended by Nardone, Hoffman, Erickson, LeVeque, Kleb, Geiger and Velez (R. 33, 35, 98, 179). Geiger was a radio operator who was employed about this time and furnished with equipment for maintaining ship-to-shore communication during the bootlegging operations (R. 32-35). Velez, a sea captain formerly employed by LeVeque in rum-running, was seeking employment with the conspirators about this same time (R. 178-180).

The "Pronto" was repaired and put into service again, running liquor into Keansburg, New Jersey, from the "Isabel H". (R. 106.) On November 22, 1935, Alcohol Tax Unit investigators arrived at the Keansburg pier where the "Pronto" had just unloaded 750 gallons of alcohol (R. 78, 245). LeVeque and co-conspirator Saunders were identified by these investigators as being present at this time (R. 247-

249). After the confiscation of the cargo at Keansburg the conspirators shifted their operations to South Carolina (R. 82-85). But on January 20, 1936, the "Pronto" was captured by a coast guard cutter while running a load of alcohol ashore (R. 137). The "Isabel H" escaped (R. 123). In March, 1936, following efforts by Velez (R. 183), Nardone, under the name of Edmond, arranged for the use of a vessel called the "Southern Sword," owned by defendant Callahan, with defendant Hugh Brown in command (R. 187-188, 193-194). Valez became chief mate (R. 187). The "Southern Sword" received a cargo of alcohol from the "Isabel H" and brought it in to New York harbor (R. 189-190). Petitioner Gottfried, a part owner of the smuggled cargo (R. 188), arranged to have Callahan taken out to meet the "Southern Sword" (R. 240-244), and the liquor was unloaded on March 17, 1936 (R. 190-191). Nardone, LeVeque, and others were arrested on March 20 at the Belfort Restaurant, a place frequented by the conspirators. Petitioner Gottfried was present and attempted to conceal certain incriminating papers (R. 172-173).

An indictment similar to the one in the present case was returned against Nardone, Gottfried, Callahan, Brown, and LeVeque (Government's Brief in Circuit Court of Appeals, p. 4). LeVeque pleaded guilty. The remaining defendants stood trial and were found guilty. The convictions were reversed by this Court in *Nardone v. United States*, 302 U. S. 379, because of the introduction of certain interstate telephone



communications of the defendants which had been intercepted by agents of the Government. A new indictment was filed, naming all the defendants in the original case except LeVeque, and in addition Nathan W. Hoffman and Bert Erickson. Erickson pleaded guilty to the conspiracy count (R. 23). The remaining defendants were convicted after trial.

None of the intercepted communications was introduced in evidence at the trial in the instant case. The Government made its case almost entirely upon the testimony of participants in the conspiracy (e. g., Geiger, Velez, Kleb, Lancaster, Murphy), and persons with or through whom the conspirators did business (e. g., employees of telephone and telegraph companies, tugboat and shipyard operators, and restaurant proprietors). Testimony by Government agents was limited to facts personally observed; e. g., coast-guard employees testified to the trailing of defendants' boats; Alcohol Tax Unit investigators testified to meetings of the conspirators at hotels and restaurants, and identified certain alcohol exhibits. Petitioners' connection with the conspiracy, as recognized by the court below (R. 359-360), was clearly established by the evidence (Nardone, R. 31-32, 35, 36, 38, 40, 98, 145, 148, 152, 158, 180; Hoffman, R. 31-32, 35, 36, 98, 103, 144, 158, 180, 214; Gottfried, R. 40, 144, 158-161, 164, 165, 172-173, 203, 242).

Early in the trial in the instant case, during the examination of the first witness, George Geiger (R. 41), defendants called the attention of the court

to a motion which they expected to make with regard to the testimony of the witness, but the actual motion was not made until the witness had completed his testimony. At that time (R. 46), the defendants moved that Geiger's testimony be stricken on the ground that his evidence had been "obtained by the unlawful interception of telephone and telegraph messages" by means of wire tapping, in violation of Section 605 of the Communications Act of 1934, and that "the existence of the witness, the fact that he was a witness to some of the transactions and the relations between the defendants and of the witness with the defendants and other persons alleged to be cooperating with them" were revealed by the unlawful interceptions. At this time the court announced that the matter would be taken up later in the trial (R. 46).

At the close of the second witness' testimony, defendants again objected and offered to prove that the very existence of Geiger and his connection with the defendants' transactions were learned by wire tapping. After some colloquy (R. 50-52), the court allowed counsel to state in the record what offer of proof would be made. This statement was to the effect that one Kozac of the Alcohol Tax Unit did not know Geiger or Nardone or any of the defendants prior to the interceptions (R. 52). The motion to strike Geiger's testimony was then denied. Defendants offered to prove that "all of the acts complained of in this indictment became known to the Government solely through or from this wire tapping"

(R. 52-53). After further colloquy on this point (R. 53-55), the court stated that it thought the inquiry should wait. Defendants offered to call Kozac and Geiger, but this offer was rejected and the motion to strike was again denied (R. 55). During the trial the defendants repeated their objections and motions to strike. These were all denied and exceptions taken (R. 94, 138, 142, 152, 157).

At the instance of the defendants, the trial court, upon conclusion of the Government's case, conducted an inquiry for the purpose of ascertaining whether any of the Government's evidence resulted exclusively from wire tapping (R. 265-300). With this end in view, the defendants, out of the presence of the jury (R. 265), called as their first witness Kozac (R. 266), a Government agent who at the first trial had testified as to the contents of certain intercepted messages. Early in the examination of Kozac (R. 268), the court stated that an inquiry would be of no purpose unless the defendants could show that some evidence was derived exclusively from wire-tapping sources. However, the inquiry was continued, with the result that Kozac testified, in substance, that he had not known of the existence of the petitioners (R. 269), or of Geiger (R. 270), or of Geiger's relations to Nardone (R. 270) prior to the interception of the telephone communications.

At this point (R. 270), the court said it thought the evidence "most non-conclusive." After a lengthy colloquy between court and counsel (R. 270-279), the examination of Kozac was resumed, the court ad-

monishing the defendants to attack specific portions of the evidence and to demonstrate that the testimony of any particular witness, or any other evidence, was obtained exclusively from an illegal source (R. 279, 286). The court assured the defendants that it would hear them upon any testimony which would establish that specific evidence was so obtained (R. 279, 286). The court told defendants that they had no right "to go fishing" (R. 285) and finally said (R. 286):

The Court, after listening to one witness, concludes as a matter of fact that this testimony is incoherent and not conclusive; that the Court now offers to hear an attack on any special part of the testimony that any attorney in the case believes he can fairly attack, as believing it came from no other source, and in default of that I rule the discovery of the complaint has nothing to do with the evidence.

Defendants then offered in evidence Exhibit A, containing testimony of one Martin, a Government agent, in a removal proceeding (R. 287-288), and Exhibit B, records of interceptions and testimony relating thereto received at the first trial (R. 288-289). These were marked for identification, but the court refused to admit them, apparently on the ground (See R. 52, 270, 279, 285, 286, 288-289) that none of the offers of proof made by the defendants did more than show that some of the Government's evidence could have been derived from the intercepted messages, without excluding the possibility of an independent source.

The Government was then permitted to call one William E. Dunigan (R. 290-300), supervisor of the investigation in the instant case, whose testimony was in substance that various telegrams introduced in evidence were not obtained as a result of wire-tapping (R. 290); that much of the information he procured concerning the case was revealed to him by informers both prior to the installation of the wire taps and during the time the "taps" were being taken (R. 290, 292, 295); that the seizure of the vessel "Pronto" did not result from intercepted information; that names of Lancaster and other members of the "Pronto" crew who testified at the trial were never mentioned in any intercepted messages (R. 291, 293); that the identity of Velez [a principal Government witness (R. 177-230)] was not known until he was arrested (R. 293); that the names of certain witnesses, who were members of the crew of the "Southern Sword," were learned after the discontinuation of the wire tapping (R. 266, 293). The witness also stated that if the "taps" had been the only information available to the Government there would never have been a seizure in the case (R. 295).

The testimony of Government agents Kozac and Dunigan showed that the wire-tapping took place during a period extending from December 20, 1935, to approximately March 20, 1936 (R. 266, 267, 290-293). The conspiracy started late in 1934 or early in 1935. The witnesses Kleb and Lancaster were known to the Government as early as January



1935 (R. 102, 296-297). In September 1935 the Coast Guard Cutter "Argo" was trailing the "Pronto," and on October 6, 1935, the disabled "Pronto" was towed by the Coast Guard into New London with a cargo of alcohol aboard (R. 105, 118). The witness Lancaster and the coconspirators Conrad and Van Austin were identified at the time as members of the crew (R. 120). A special assistant to the Secretary of the Treasury was in Belgium in October 1935 observing the loading of cases of alcohol on the "S. S. Rydoon." In November 1935 the "Rydoon" was observed by the Coast Guard off the coast of Newfoundland transferring cases to the "Isabel H" (R. 115, 116, 118-120, 122).

The witness Dunn, a Government agent, testified that on December 19, 1935, he observed the petitioner Hoffman, the defendant Erickson, and co-conspirators LeVeque and Geiger at the Hotel Astor and saw them sending a money order and a telegram, Government's Exhibits 13 and 14 (R. 249-251). Witnesses Wald (R. 95-96) and Weiss (R. 98-102) were employees at the Hotel Astor. They identified the petitioners Nardone and Hoffman, the defendant Erickson, coconspirators LeVeque and Kleb, as meeting at the Hotel regularly, sending money orders, and making long-distance telephone calls to Montreal and Nova Scotia. These witnesses were known to the Government prior to the tapping of the telephone wires as appears from Dunn's testimony (R. 249-251).

Saunders and LeVeque were observed by Government agents on November 22, 1935, while participating in an attempt to prevent the confiscation of the cargo of alcohol which had just been illegally landed at Keansburg from the "Pronto" (R. 248-249).

#### SUMMARY OF ARGUMENT

##### I

The petitioners were not entitled to conduct an inquiry into the sources of evidence used in convicting them. No intercepted telephone communications were introduced in evidence or otherwise "used" in the trial. Any "use" of the intercepted telephone communications for the purpose of locating witnesses was completed long before the trial so that any violation of the Communications Act involved in such a use would not make the evidence inadmissible, under the well-settled rule that illegality in obtaining evidence not amounting to an invasion of a defendant's constitutional rights does not prevent the use of the evidence.

There is no basis for construing Section 605 of the Communications Act with the liberality which would be appropriate to a construction of constitutional immunities. But even if there were, the evidence in this case would not have been inadmissible since no case has extended the constitutional immunities beyond evidence directly obtained by the unlawful search and seizure. *Benetti v. United States*, 97 F. 2d 263 (C. C. A. 9th). Moreover, it is well settled that facts discovered as a result of an extorted con-

fession may be used against the defendant although the confession itself may be barred by the Fifth Amendment.

A rule permitting a general inquiry into the source of the prosecution's evidence would seriously impede the administration of justice by requiring the court to halt in the orderly progress of a cause to consider incidentally a collateral question. It would be impossible in many cases to determine that a particular piece of evidence came from a "tainted" rather than an "innocent" source since many factors may combine to turn an investigation in a particular direction.

## II

Even if petitioners were entitled to an inquiry, the record demonstrates that they were permitted to make a full inquiry and that they failed to establish that any part of the Government's case was derived exclusively from wire tapping. The trial court properly called a halt to a proceeding which amounted to no more than a "fishing expedition" into the Government's case. All offers of proof made by the petitioners were properly rejected since they held forth no promise of showing that the Government's case had not been built up from lawful sources, and it was affirmatively shown that wire tapping occupied a very insignificant place in the preparation of the prosecution.

## ARGUMENT

In granting the petition for writ of certiorari this Court limited its review "to the question whether the trial court correctly disposed of petitioners' claim that a portion of the respondent's evidence was procured through the illegal interception of telephone and telegraph messages and the question of the propriety of a preliminary inquiry to ascertain that fact." Preliminarily it should be pointed out that none of the intercepted communications were themselves introduced in the instant case,<sup>1</sup> nor does it appear that the case involves any intercepted telegraph communications. The Government's position is that the petitioners were not entitled to any inquiry into the source of the Government's evidence and that, in any event, they were allowed a full inquiry but failed to sustain the burden of establishing that the Government's evidence was inadmissible.

## I

PETITIONERS WERE NOT ENTITLED TO ANY INQUIRY  
AS TO THE SOURCE OF THE GOVERNMENT'S  
EVIDENCE

It is clear that petitioners were entitled to an inquiry into the source of the Government's evidence only if it be assumed that evidence obtained as an indirect result of wire tapping would have been inadmissible. Without conceding that the Govern-

<sup>1</sup> These intercepted communications had been introduced at a former trial and this Court reversed the convictions on that ground. *Nardone v. United States*, 302 U. S. 379.

ment's case was prepared by the use of unlawfully intercepted communications, we submit that even if the petitioners had been able to prove that the evidence upon which they were convicted had been obtained as an indirect result of wire tapping, the testimony would, nevertheless, have been admissible.

A. SECTION 605 OF THE COMMUNICATIONS ACT WAS NOT VIOLATED BY THE INTRODUCTION OF THE GOVERNMENT'S EVIDENCE AT THE TRIAL

It should be noted in the beginning that the present case turns solely upon a possible violation of Section 605 of the Communications Act of 1934. Petitioners do not contend that the interceptions in the instant case constituted an unlawful search under the Fourth Amendment. On the contrary, they assert that it was unnecessary for the court below to consider, as it did, whether *Olmstead v. United States*, 277 U. S. 438, had been overruled, and state that (Pet. 16), "The primary question here is whether in the face of an express legislative ban on the interception of telephone and telegraph and similar messages, Government agents may nevertheless commit the crime of making such interception and use the information thus obtained as evidence in a criminal prosecution."

We submit that there is nothing in the Communications Act which declares inadmissible evidence obtained by the Government as the result of leads secured by wire tapping. Clause 2 of Section 605 was certainly not violated in the instant case, since the Government's witnesses did not "divulge or



publish the existence, contents, substance, purport, effect, or meaning" of any intercepted communication. As the Circuit Court of Appeals pointed out (R. 362), distinguishing *Nardone v. United States*, 302 U. S. 379:

\* \* \* Congress had not also made incompetent testimony which had become accessible by the use of unlawful "taps," for to divulge that information was not to divulge an intercepted telephone call.

Nor do the "use" provisions of clauses 3 and 4 of Section 605 render such evidence inadmissible. Those clauses obviously refer to the use of the intercepted communication itself or the very information contained therein. Their language is clear and specific. Clause 3 provides that—

\* \* \* no person not being entitled thereto shall receive or assist in receiving any  
\* \* \* communication \* \* \* and use  
the same or any information therein contained  
\* \* \* [Italics supplied.]

and Clause 4 provides that—

\* \* \* no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, \* \* \* shall \* \* \* use  
the same or any information therein contained  
\* \* \* [Italics supplied.]

These clauses would be as broad as the petitioners contend only if there were added the words "or any information derived therefrom."

That the "use" provisions of clauses 3 and 4 of Section 605 do not apply to evidence obtained from leads contained in an intercepted message is supported by the decision of this Court in *Counselman v. Hitchcock*, 142 U. S. 547. In this case a witness refused to answer certain questions put to him by a grand jury, on the ground that the answers would be self-incriminating. The District Court held him in contempt and he sought habeas corpus. The Government argued that the witness was sufficiently protected from possible future use of his answers against him by Section 860 of the Revised Statutes, which provided, in part, that:

No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or *in any manner used* against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: \* \* \* [Italics supplied.]

This Court held that the writ should be granted, on the ground that the witness' constitutional privilege had been invaded. With respect to R. S. § 860, the Court said (p. 564):

This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not,

prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion \* \* \*

It is apparent, therefore, that this Court did not consider that the introduction of evidence obtained from leads divulged by one forced to testify would constitute a violation of the provisions of the section. Accord: *In re Phillips*, 19 Fed. Cas. p. 506, Case No. 11,097 (Dist. Va. 1869). Certainly if the use of evidence indirectly obtained from compelled testimony did not, under Section 860, constitute a "use" of the compelled testimony itself, no more does the use of evidence obtained from leads resulting from intercepted communications constitute a "use" of the communications themselves.

Moreover, even assuming *arguendo* that the Government made use of intercepted communications in seeking out new evidence, when that new evidence was discovered the use of the intercepted information was complete. The introduction of any further evidence discovered by working from this new information cannot be said to constitute a use of the intercepted information, any more than could the occupancy of a building be said to constitute a use of the hammer that was used in its construction. So, too, when the ultimate fact is introduced in

evidence, there is no longer a use of the intercepted communication, but, on the contrary, a use of the new and independent source of information. The point at which "use" ceases must be placed somewhere. We submit that it should be at the first point where information discovered as a consequence of interception is in turn adopted as a new source. Otherwise, the extension might be carried through an absurd number of steps and length of time to a point remote from the original intercepted communication.

It follows therefore that the giving of testimony in court by witnesses whose identity was learned from intercepted communications would not be a use of intercepted communications within the meaning of Section 605. However, it may be conceded, for the purpose of argument, that the intercepted communications were used in violation of Section 605 in obtaining witnesses. But that illegality would have occurred not in the presentation of the evidence, as in the first *Nardone* case, but in the method by which the evidence was secured. This presents the question whether a violation of the statute in procuring evidence renders that evidence inadmissible.

It is well settled that evidence is not rendered inadmissible because obtained as the result of an illegal or criminal act not amounting to a violation of a constitutional provision, and that the courts will not take notice of the manner in which the evidence may have been secured. *Olmstead v. United States*, *supra* (p. 467), and opinion below (R. 362). See also the well-considered opinion of the late Mr. Justice

Cardozo in *People v. Defore*, 242 N. Y. 13, certiorari denied, 270 U. S. 657.

**B. SECTION 605 SHOULD NOT BE CONSTRUED AS BROADLY AS IF IT WERE A CONSTITUTIONAL PROVISION**

Even though petitioners expressly disclaim any intention to raise the question as to whether the *Olmstead* decision has been overruled, they seem to contend that Section 605 of the Communications Act should be so construed as to afford a protection as broad as would be that of the Fourth and Fifth Amendments. They take the position that evidence indirectly obtained from leads resulting from a violation of the Constitution would not be admissible, and urge that a similar construction should be given to the statutory prohibitions of Section 605 (Pet. 16-17).

We submit, however, that the petitioners' contention cannot be sustained for the following reasons:

(1) A statute should not be interpreted so as to effect any change in the common law beyond that which is clearly indicated. All statutes in derogation of the common law are to be strictly construed. *Shaw v. Railroad Co.*, 101 U. S. 557, 565; *Douglass v. Lewis*, 131 U. S. 75, 85; *Brunswick T. Co. v. National Bank of Baltimore*, 192 U. S. 386, 390; *Northern Securities Company v. United States*, 193 U. S. 197, 361 (concurring opinion); *United States v. Breeding*, 207 Fed. 645, 649 (W. D. Va.); *United States v. Sutherland*, 214 Fed. 320, 323 (W. D. Va.); *Wood v. White*, 97 F. (2d) 646, 648 (App. D. C.). That



Section 605 of the Communications Act is in derogation of the common law sufficiently appears from a comparison of the *Olmstead* case and the *Nardone* case, and the interpretation urged by petitioners would certainly effect a change in the common law beyond any declaration in the statute.

(2) Courts regularly distinguish between the liberality with which a constitutional provision should be construed and the strict interpretation to be given to statutes. The reasons for such a distinction lie in the difference between the broad, fundamental and relatively inflexible provisions of a constitution as contrasted with the more detailed and perhaps more transient policies represented by statutes. The comparative ease with which a statute may be amended has also been pointed to in explaining the difference of approach. See *People v. Defore*, 242 N. Y. 13, 23, certiorari denied, 270 U. S. 657; cf. *Legal Tender Case*, 110 U. S. 421, 439.

(3) The petitioners' contention is merely an attempt, in the guise of a purported rule of statutory construction, to evade the well settled principle that only a violation of the Constitution will justify the exclusion of evidence. *Weeks v. United States*, 232 U. S. 383; *Olmstead v. United States*, 277 U. S. 438, 467-468, and cases cited. Of course, Congress may by direct legislation prohibit the admission of evidence obtained in a certain manner, but Section 605 of the Communications Act of 1934 is not a "rule of evidence" statute, nor was it so construed in the first *Nardone* decision. See Government's

brief in *Weiss et al v. United States*, No. 42, present Term, pp. 35-36.

C. THE GOVERNMENT'S EVIDENCE WOULD NOT BE INADMISSIBLE  
EVEN IF SECTION 605 WERE CONSTRUED WITH THE LIBER-  
ALITY APPROPRIATE TO CONSTITUTIONAL INTERPRETATION

Even if Section 605 of the Communications Act be construed to afford a protection as broad as that of the Fourth and Fifth Amendments, we submit that evidence resulting from leads obtained by interceptions would not be rendered inadmissible under the rules enunciated in any decision of this Court. The petitioners do not cite, nor have we been able to find, any decision of this Court which goes to the extent of holding that not only the unconstitutionally seized evidence itself is inadmissible, but also that evidence obtained as a result of leads arising from the illegally seized evidence is incompetent. *Silverthorne Lumber Company v. United States*, 251 U. S. 385, strongly relied upon by the petitioners, certainly does not apply any such rule. There the question presented was simply whether a defendant could be compelled by subpoena to produce before a grand jury documentary evidence, knowledge of the existence of which had been acquired through a previous unlawful search and seizure. It is apparent, therefore, that the case is authority only for the well settled proposition that the very evidence which was the object of the search shall not be used against the defendant. While this Court said that the evidence could not be obtained "in the way proposed", it also

stated that the facts discovered do not "become sacred and inaccessible". Moreover, in the *Silverthorne* case this Court was concerned with an attempt to force the defendant himself to produce self-incriminating evidence.

As far as the lower Federal courts are concerned, the only case which we have been able to find ruling squarely upon the question of the admissibility of evidence discovered in consequence of information contained in unlawfully seized documents is *Benetti v. United States*, 97 F. (2d) 263 (C. C. A. 9th). In this case the defendant was indicted for tax evasion. Upon appeal from conviction he urged that error had been committed in the refusal to direct a verdict in his favor on the ground that revenue agents had learned of the commission of the crime by examining records of a prohibition case against him. The indictment in the prohibition case had been quashed and the evidence suppressed on the ground that defendant's premises had been searched without warrant. The conviction in the income tax case was affirmed by the Circuit Court of Appeals for the Ninth Circuit, the Court saying (p. 267):

As supporting his position, appellant cites *Counselman v. Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426; *Gould v. United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647. These authorities do not support any such extreme contention as is here made. In these cases it was sought to make use of the

very evidence that had been suppressed. There was nothing of that kind in this case. Here the most that could be said was that, as a result of the unlawful seizure, the government was made aware that appellant was illegally engaged in selling intoxicating liquor which aroused suspicion that appellant was evading full payment of his income tax. That this caused the investigation whereby the government came into possession of other perfectly legal evidence which was in every way competent and admissible, unless appellant's claim of immunity is sustained. [Sic]

\* \* \* \* \*

Even if the crime for which appellant was indicted was revealed by an illegal search and seizure in another case, he would not be immune from prosecution and his conviction cannot be set aside if sustained by evidence obtained from independent sources and no evidence illegally seized was used against him. Constitutional provisions forbidding the use of evidence secured in an illegal way are not to be construed to mean that the facts thus disclosed are forever inaccessible. In the opinion in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426, relied upon by appellant, there is language used by Justice Holmes which sustains this view. At page 392, 40 S. Ct. at page 183, it was said:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not

be used before the Court but that it shall not be used at all. *Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others \* \* \**

There have been contrary intimations but no direct holdings in the Second Circuit. Thus, in *Fitter v. United States*, 258 Fed. 567, 574-575, the Circuit Court of Appeals for that circuit affirmed a conviction after pointing out that the trial court had adequately safeguarded the defendant's rights by excluding all testimony "learned indirectly as the result of the contents" of the illegally seized papers. Of course, this is not equivalent to a ruling that the admission of such evidence would have been error but constitutes a holding only that such evidence had not in fact been used in the trial court. It is worth noting that the court distinguished the *Weeks* case, saying that it had no inclination to extend the rule therein to the facts in the case before it. The court added (pp. 574, 575):

The illegal acts of the subordinate agents of the United States should not afford to the clearly guilty a means of escape from a just punishment unless conviction has been secured through the use of documents or other evidence containing self-incriminating matter obtained by illegal means.

The statement by Judge Learned Hand in *United States v. Kraus*, 270 Fed. 578, 580 (S. D. N. Y.), that "The prosecution may not use at the trial or in its



preparation any information obtained from their [unlawfully seized papers] scrutiny" is clearly dictum, for the court was acting upon a petition for the return of the very papers which had been illegally seized. It is significant, moreover, that Judge Hand, in writing the opinion in the instant case in the court below, cited the *Kraus* case without feeling bound to follow it.

A single example will demonstrate the absurd consequences which would result if the petitioners' construction were followed. The Government, in investigating a crime, intercepts a telephone conversation by "Z" and obtains the name of "A." In questioning "A," the identity of "B" is revealed. "B," in turn, uncovers "C," and so on through any number of steps to "X," who reveals an entirely new and unsuspected serious offense also committed by "Z." "X" is the only witness to "Z's" crime and his testimony is necessary in obtaining a conviction. Yet, if petitioners' contention be upheld, "Z" is completely immune because the existence of his crime and the only witness against him were both discovered through leads initially opened by wire tapping. Again, we submit, a line must be drawn. Unless it is placed so as to render inadmissible only the very evidence initially discovered, there is no other point of stoppage, once the realm of indirect evidence is entered.

Moreover, we submit, evidence so disclosed is not strictly speaking a part of the evidence discovered by an unlawful search or by interceptions. It is, to be

sure, evidence the Government was enabled to produce because of such search or interceptions, but it is also equally clearly evidence which was not contained in the intercepted communication.<sup>2</sup>

A complete analogy to the rule governing the admissibility of evidence resulting from involuntary confessions exists in the instant case. It has long been the settled common-law rule that even though an involuntary confession is not admissible, facts and information discovered in consequence of such a confession are competent.<sup>3</sup>

<sup>2</sup> See *McQueen v. Commonwealth*, 196 Ky. 227, where the court applied this reasoning to facts revealed in an involuntary confession, although Kentucky had, prior to this time (*Youman v. Commonwealth*, 189 Ky. 152) adopted the doctrine of the *Weeks* case.

<sup>3</sup> "The rule is settled that, notwithstanding the inadmissibility of the confession, all facts discovered in consequence of the information given by the accused, and which go to prove the existence of the crime of which he is suspected, are admissible as testimony." 2 *Wharton's Criminal Evidence*, 995 (11th ed., 1935), citing cases: *Wigmore on Evidence*, (2d ed.), §. 859, and cases cited; *United States v. Richard*, Fed. Cas. No. 16154; *United States v. Hunter*, Fed. Cas. No. 15, 424. See also *Lewis v. State*, 220 Ala. 461; *Shufflin v. State*, 122 Ark. 606; *Osborn v. People*, 83 Colo. 4; *Jones v. State*, 75 Ga. 825; *People v. Ascey*, 304 Ill. 404; *State v. Moran*, 131 Ia. 645; *State v. Turner*, 82 Kan. 787; *McQueen v. Commonwealth*, 196 Ky. 227; *Belote v. State*, 36 Miss. 96; *State v. Simpson*, 157 La. 614; *Dupuis v. State*, 14 Ohio App. 67; *State v. Dixon*, 80 Mont. 181; *Walrath v. State*, 8 Neb. 80; *State v. Riddle*, 205 N. C. 591; *Duffy v. People*, 26 N. Y. 588; *State v. Molley*, 7 Rich. Law 327 (S. C.); *Collins v. State*, 169 Tenn. 393; *Bryant v. State*, 131 Tex. Cr. R. 274; *State v. Cocklin*, 109 Vt. 207.

This Court has squarely and definitely based the exclusion of involuntary confessions upon the self-incrimination clause of the Fifth Amendment. *Bram v. United States*, 168 U. S. 532.<sup>4</sup> See also *Weeks v. United States*, 232 U. S. 383, 392; *Wan v. United States*, 266 U. S. 1, 17 (n. 6). There can be no real distinction between evidence discovered by means of an involuntary confession and that discovered by means of interception, since the objection to both springs from the same source. It would not seem logical that evidence indirectly obtained by wire tapping should be rendered inadmissible when an involuntary confession usually represents the results of a far more aggravated invasion of privacy.

This Court, in the *Bram* case (at page 543) said:

A brief consideration of the reasons which gave rise to the adoption of the Fifth Amendment, of the wrongs which it was intended to prevent and of the safeguards which it was its purpose unalterably to secure, will make

<sup>4</sup> In the *Bram* case this Court said (p. 542):

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' \* \* \*"

it clear that the generic language of the Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted, \* \* \*

Since the common law did not exclude evidence discovered in consequence of an involuntary confession, it follows that such evidence is not excluded by the Fifth Amendment. In this connection it is important to note that, so far as we have been able to discover, even those states which have adopted the rule excluding evidence obtained by an unlawful search and seizure, nevertheless, continue to admit inculpatory facts discovered in consequence of an involuntary confession.<sup>5</sup> In *Smith v. State*, 166 Miss. 893, the Supreme Court of Mississippi which had theretofore placed extorted confessions in the same category with unlawful searches and seizures<sup>6</sup> refused to exclude evidence obtained as the result of involuntary confessions.

In view of the above, it follows that evidence indirectly discovered in consequence of interceptions is not rendered inadmissible by the Communications Act, since even the petitioners do not contend that that statute should be construed more broadly than is the Fifth Amendment.

<sup>5</sup> See, for example, decisions admitting such evidence subsequent to the adoption of the rule excluding evidence obtained by an unlawful search and seizure: *McQueen v. Commonwealth*, 196 Ky. 227; *Smith v. State*, 166 Miss. 893; *State v. Dirson*, 80 Mont. 181; *Collins v. State*, 169 Tenn. 393; *Bryant v. State*, 131 Tex. Cr. R. 274.

<sup>6</sup> *Tucker v. State*, 128 Miss. 211, 223.

D. A RULE PERMITTING INQUIRIES OF THE TYPE SOUGHT IN THIS CASE WOULD SERIOUSLY IMPEDE THE ADMINISTRATION OF JUSTICE

From a practical standpoint no argument could be more persuasive against petitioners' view than the immense difficulties which trial courts would encounter in attempting to carry out a rule entitling a party to inquire as to the sources of evidence which is not a direct product of an illegal act but merely obtained as an indirect consequence thereof. The experience of the trial court in the present case is a demonstration of this fact. Against a volume of testimony given by a score of witnesses, there was launched an indiscriminate, non-specific attack with which the court was helpless to deal. The Circuit Court of Appeals itself, as its opinion shows, was at a loss to prescribe an appropriate procedure for an inquiry of the character undertaken, or to mark out the extent to which the "original taint pervades the last scrap of evidence eventually found" (R. 363). The situation is far more complicated than in *Watson v. United States*, 6 F. (2d) 870 (C. C. A. 3d) cited in the opinion of the Circuit Court of Appeals (R. 361). In the *Watson* case a conviction was reversed because of the trial court's refusal to permit a Government witness to be cross-examined for the purpose of showing that the witness' information was derived directly from papers seized in violation of the Fourth Amendment. No such cross-examination would have sufficed in the instant case, for none of the witnesses testified from any illegally obtained



communications. This was so clear that defense counsel did not even attempt to cross-examine on this point. Only a general drag-net inquiry, covering every step in an investigation conducted by 45 to 55 agents (R. 293) could have established how much, if any, of the Government's case rested ultimately on wire tapping—*unless* the petitioners had been willing, as they apparently were not, to accept the testimony of the only person qualified to give an over-all view of the preparation of the Government's case, the man in charge of the investigation.

Moreover, the difficulties will not end with the inconvenience of receiving a large mass of testimony upon a matter collateral to the question of defendant's guilt. When all this evidence as to the source of prosecution testimony is received there will still remain the sore question of assigning to each "scrap of evidence" a "tainted" source or an innocent one. Will it not invariably be found that every step in building up the case prior to trial is the consequence of many antecedent causes? Conspirator "X's" name was known for a long time because of his connection with previous illicit activities. Agent "A" reports seeing him with "Y", definitely involved in the crime under investigation. Agent "B" discovers an apparent innocent explanation for the association of "X" with the conspirators. Agent "C" hears "X's" name mentioned in an intercepted telephone call between two known members of the conspiracy. Perhaps in the end the only testimony introduced against "X" will be a letter taken from his waste-

basket by a janitor. Who can say what value should be assigned to each clue in a series which leads to "X's" conviction? In this respect a collateral inquiry presents far more difficulties than would a proceeding under the Communications Act to punish a violation under Section 605, for in such a proceeding it would be necessary to establish only that the defendant had wilfully intercepted and divulged the contents of an interstate telephone communication. Communications Act of 1934, Section 501 (U. S. C., Title 47, Sec. 501).

Furthermore, a new field would be opened for appeals on technical issues unrelated to the substantial question which the trial was to determine. Appellate courts will be drawn into controversies over the existence of prejudicial error in this subsidiary proceeding to determine the competence of evidence to be offered in the main case.

Shall the inquiry be conducted in advance of trial or will objection be entertained in the course of the proceedings? As the Circuit Court of Appeals pointed out (R. 363) the conduct of a general inquiry like the one sought in the present case in advance of trial would simply amount to a review of the Government's evidence—a profitable maneuver for the defense regardless of its success in connecting wire-tapping with the Government's case. Furthermore, an inquiry in advance could hardly bar defendant from further objection during the trial, for the Government might introduce evidence not known to exist at the time of the preliminary inquiry, or not

then expected to be used. In the usual case, also, the defendant may not come to suspect that his wires have been tapped until he is surprised by particular testimony offered at the trial and hence could not demand an inquiry before that time. Indeed, one may wonder whether the inquiry could ever come too late, and whether convicts now imprisoned should not, if petitioners' view be correct, be allowed to show on *habeas corpus* that conviction had been obtained by means of wire-tapping until now unsuspected. Cf. *Beard v. United States* 99 F. 2d 750 (App. D. C.), certiorari denied 306 U. S. 655.

It is submitted that just such delays and obstruction of justice as have been mentioned furnish the reason for the adoption by courts of the rule that evidence should be admissible regardless of any illegality by which it was obtained, and the corollary principle that a trial will not be interrupted for the purpose of conducting a hearing on the source of the evidence. So valuable is the principle that it has retained its vitality, with appropriate modifications, even where constitutional privileges against unreasonable searches and seizures and compulsory self-incrimination are involved. *Adams v. New York*, 192 U. S. 585, 595. See also *Weeks v. United States*, 232 U. S. 383, 395-396; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392; *Marron v. United States*, 275 U. S. 192, 198. In the *Weeks* case this Court held that evidence seized by agents of the Federal Government in violation of Constitutional provisions must be excluded if a timely motion to

compel return had been made before trial. This Court has further ruled that such a motion before trial is unnecessary if the defendant had no knowledge until the trial that an illegal seizure had been made, *Gould v. United States*, 255 U. S. 298, 305; or if the facts were undisputed, *Agnello v. United States*, 269 U. S. 20, 34; *Amos v. United States*, 255 U. S. 313. In no case that the Government has been able to find was any inquiry permitted to go beyond cross-examination of the prosecution witnesses, and in every case where this Court has sanctioned the exclusion of evidence the evidence in question was that directly obtained by the unlawful act. On the other hand, in the instant case, the facts are very much in dispute; the origin of the evidence was very difficult of ascertainment; the evidence sought to be excluded was not evidence obtained by wire-tapping; and the basis of exclusion could not be established solely by cross-examination. As pointed out by the court below (R. 363), the evidence here "does not bear the ear-marks of its acquisition." To determine its origin would have required a "fishing expedition" into the background of the Government's case, a complete and lengthy independent trial or inquiry. As pointed out in the Note to *State v. Turner*, 82 Kan. 787, in 136 AM. St. Rep. 129, 135, 142, such an inquiry would require the court "to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of \* \* \* litigation, and which

is wholly independent thereof." See *Weeks v. United States*, 232 U. S. 383, 396.

"If this is the attitude of courts where invasions of constitutional rights were charged, we submit that certainly no greater protection should be thrown about rights established by a statute, as in the present case.

For the reasons stated, we submit that the petitioners were not entitled to any inquiry as to the source of the Government's evidence. Therefore, it follows that the trial court did not commit reversible error in limiting any inquiry which the petitioners attempted.

## II

PETITIONERS WERE ALLOWED A FULL INQUIRY BUT FAILED TO MEET THE BURDEN OF PROOF WHICH DEVOLVES ON ONE WHO MOVES TO STRIKE OUT EVIDENCE

- A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY BARRING A "FISHING EXPEDITION" INTO THE GOVERNMENT'S CASE.

It must be emphasized that the trial court at no time refused to hear objections to specific portions of the Government's evidence and testimony in support of such objections. Indeed the court specifically invited defense counsel to present such testimony (R. 279, 286). The court called a halt only when it became apparent that this opportunity was to be employed "to go fishing" into the Government's case (R. 285) and that the testimony being adduced was, and would continue to be, inconclusive (R. 285, 286).



No proposition is better established than that which forbids general inquiries into an opponent's evidence. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298; *Federal Trade Commission v. Hammond, Snyder & Company*, 267 U. S. 586; *Hale v. Henkel*, 201 U. S. 43, 76; *Carpenter v. Winn*, 221 U. S. 533, 540.

Also, it is well settled that determinations by a trial court as to matters preliminary to the admission or exclusion of evidence should be accorded finality except in the clearest cases of abuse of discretion. *Stillwell Mfg. Co. v. Phelps*, 130 U. S. 520; *Gila Valley Ry. Co. v. Hall*, 232 U. S. 94. See *Wigmore on Evidence* (2d ed. 1923) §16 (c). Thus, the competency of an infant to testify has been held to be a matter "peculiarly within the province and discretion of the court." *Oliver v. United States*, 267 Fed. 544, 547 (C. C. A. 4th). So also as to the qualifications of an expert. *Citizens Bank and Trust Co. of Middlesboro, Ky. v. Allen*, 43 F. (2d) 549 (C. C. A. 4th); *Morton Butler Timber Co. v. United States*, 91 F. (2d) 884 (C. C. A. 6th). And this is the rule even where the question involved is whether evidence was seized in violation of the Fourth Amendment. *Kovach v. United States*, 53 F. (2d) 639 (C. C. A. 6th); *United States v. Bianco*, 96 F. (2d) 97 (C. C. A. 2d).

Accordingly, the refusal by the trial court in the instant case to strike the Government's evidence should not be disturbed, since that ruling on a preliminary question was supported by the substantial,

if not conclusive, testimony of Dunigan, the agent who directed the investigation. See *infra*, pp. 44-46.

B. PETITIONERS' OFFERS OF PROOF WERE PROPERLY  
REJECTED

Although the trial court gave petitioner full opportunity to attack the admissibility of any specific part of the testimony which could be shown to be derived exclusively from unlawful wire tapping, it properly rejected the offers of proof made by the defense. It was apparent upon the face of every such offer that the proffered testimony or records would do no more than show that some of the Government's evidence could have been derived from intercepted messages. Not a single offer promised even a possibility of excluding an independent source. Such evidence, the court held, was inconclusive and immaterial without proof that the Government had not in fact derived its information from innocent sources. Obviously, if the Government could and did establish the crime by evidence independent of wire tapping, the existence of wire tapping would not preclude a conviction.

The reports of federal decisions are surprisingly barren with reference to the law relating to offers of proof. We must, therefore, turn to state decisions in considering this subject. It is well settled that rejection of an offer to prove a negative is not erroneous where the offer does not include facts sufficient to establish the negative conclusion. *Etter v. Dugan*, 1 Texas Unreported Cases, 175, 180 ("The offer to

prove that the signature was not the handwriting of L. Bostick was not \* \* \* equivalent to an offer to prove the attestation a forgery, or not the authorized act of Bostick."); *Carlton v. State*, 55 Tenn. 16, 20 (Suit on a comptroller's certificate for unpaid balance of taxes due; defendants offer to prove some receipts was rejected; "it is obvious that the production of some receipts, showing some payments would not contradict, or tend to contradict, the statement of the Comptroller that a balance was due."); *Manning v. Den*, 90 Cal. 610, *Williams v. Oates*, 212 Ala., 396.)

The foregoing rule is but a phase of the general proposition that "the rejection of testimony as to a solitary circumstance, which is incompetent unless other testimony be supplied, is not, in the absence of any offer to supply it, legal error." *Pier v. Speer*, 73 N. J. L. 633, 636; accord *Indianapolis Furnace and Mining Co. v. Herkimer*, 46 Ind. 142; *H. M. Farnham & Sons v. Wark*, 99 Vt. 446; *Borden v. Lynch*, 34 Mont. 503. Moreover, in passing upon alleged errors in rejecting offers of proof, courts have said that the burden is upon the person making the offer to establish the admissibility of the evidence. *Burns v. Leath*, 236 Ala. 615, *Standish v. Newton*, 103 Vt. 85. It has also been held, in reviewing the rejection of an offer of proof, that an offer susceptible of several interpretations should be construed against the person making the offer. *Buck v. Troy Aqueduct Co.*, 76 Vt. 75; *Roe v. Schweitzer*, 55 Utah 204.

Applying the foregoing principles to the facts of the present case, it is clear that no error was committed in rejecting petitioners' offer of proof. The only proof which might have been admissible, to wit, proof that the Government's evidence was *not* derived from sources independent of wire tapping, was never offered, and without such proof, evidence tending to show that the Government's information might have been derived from wire tapping was clearly incompetent.

The court interrupted the questioning of Kozac, a Government investigator who had overheard the intercepted messages, only when it became apparent that a continuation of his testimony would establish no more than that he had secured certain information by wire tapping. The complete irrelevance of this testimony becomes clear when it is noted that Kozac was not a Government witness except to identify a sample of alcohol. Geiger, whom the defendants offered to call (R. 55), could certainly not have testified that his connection with defendants was learned by the Government through wire tapping, exclusively. It is equally clear that records of intercepted messages or of testimony with respect thereto in other proceedings (R. 51-53; 287-288) would show only that Geiger's name and his connection with defendants were mentioned in the intercepted messages. They would in no way establish that the Government had not learned of these circumstances by independent means. In the absence of such proof, the court had no alternative but to

deny the motion to strike the Government's evidence, since wire tapping does not render inaccessible to independent search the facts which have also been exposed by illegal interception. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385; *United States v. Reed*, 96 F. (2d) 785 (C. C. A. 2d), certiorari denied 305 U. S. 612. Any other view would mean that wire tapping, by subordinate Government officers, would confer complete immunity upon an accused and there would have been no occasion for retrying the petitioners after the first *Nardone* decision.

As to petitioners' general offer to prove "that all of the acts complained of in this indictment became known to the Government solely through or from this wire tapping" (R. 52-53) and similar offers made elsewhere in the record, these were properly disregarded by the trial court. The decisions are unanimous that an offer of proof must be of specific facts and not mere conclusions. As the Supreme Court of Oregon said in *Columbia Realty Investment Co. v. Alameda Land Co.*, 87 Ore. 277, 296:

An offer of proof should state facts rather than conclusions. Its language should be not vague, but distinct; not general, but specific. It is not sufficient that it state the ultimate facts in language appropriate to a pleading; the evidentiary facts must be set out.

And in *Horowitz v. Blay*, 193 Mich. 493, the Supreme Court of Michigan said of an offer to prove that



certain men "were incompetent, inefficient, and negligent":

This offer was not sufficiently definite as to acts of negligence to make its rejection erroneous. It did not give the court any information as to the facts plaintiff could prove bearing upon negligence, but simply stated counsel's opinion as to their legal effect. If the proofs had been received, it might have transpired that counsel was mistaken, and that they had no tendency to show negligence, or that the negligence shown had no relation to the injury. This court cannot justly reverse a case because of the exclusion of testimony unless it is able to see that the testimony, if it had been received, might have changed the result.

See also *Central Pacific Railroad v. California*, 162 U. S. 91, 117; *Lewis W. Thompson & Co. v. Conran-Gideon Special Road District*, 323 Mo. 953; *Boise Association of Credit Men v. U. S. Fire Insurance Co.*, 44 Idaho 249; *Shirley v. Madsen*, 52 S. D. 43.

C. THE BURDEN WAS ON PETITIONERS TO SHOW THAT THE GOVERNMENT'S EVIDENCE WAS INADMISSIBLE

Since all the evidence offered by the Government was on its face relevant and material, it devolved upon the petitioners to demonstrate the extraneous circumstances rendering it inadmissible. See *Wigmore on Evidence* (2d ed.) §10. Commonly applied corollaries of this general principle are the rules that evidence not objected to by the opposing party is admissible, although upon objection it might

properly have been excluded; that objections must be specific; that the overruling of objections to testimony based on invalid grounds is not reversible error although there were in fact good grounds for excluding the testimony.

With specific reference to cases of alleged invasions of constitutional immunities, many Federal courts have held that the burden is on the defendant moving to suppress evidence to establish the facts necessary to render the evidence inadmissible. *Samson v. United States*, 26<sup>th</sup> F. (2d) 769 (C. C. A. 1st); *United States v. Phillips*, 34 F. (2d) 495, 497 (N. D. N. Y.); *United States v. Derrick*, 40 F. (2d) 309 (M. D. Pa.); *United States v. Lane*, 51 F. (2d) 241 (E. D. N. Y.); but see *Kovach v. United States*, 53 F. (2d) 639 (C. C. A. 6th); *United States v. Kraus*, 270 Fed. 578 (S. D. N. Y.). This Court and some of the lower Federal courts have refused to recognize any presumption against the admissibility of confessions; involving possible violations of the Fifth Amendment, the burden being placed on the defendant to show inadmissibility. *Sparf v. United States*, 156 U. S. 51; *Perovich v. United States*, 205 U. S. 86; *Gray v. United States*, 9 F. (2d) 337 (C. C. A. 9th); *Murphy v. United States*, 285 Fed. 801 (C. C. A. 7th); *Harfzell v. United States*, 72 F. (2d) 569, 577 (C. C. A. 8th). And this position is also approved in *Wigmore on Evidence* (2d ed.) § 860. The Second Circuit has apparently taken the opposite view. *Litkofsky v. United States*, 9 F. (2d) 877 (C. C. A. 2d).

With this attitude in the cases of extorted confessions and other violations of constitutional privileges, it would be difficult to justify a different view where only the violation of a statute is involved.

The decision of the Circuit Court of Appeals for the Second Circuit in *United States v. Bonanzi*, 94 F. (2d) 570 (C. C. A. 2d); that the burden was on the prosecution to establish the intrastate character of telephone messages, receives no support whatever from the only case cited for this point in the decision. Nor is the reasoning persuasive. It is based on the fears of the impossible burden on a defendant who denies that he made the telephone call but who will, nevertheless, be required to establish the interstate character of the call in order to exclude it. The difficulty envisioned is a difficulty which every defendant who pleads alibi or mistaken identity faces. If he can establish that defense he needs no other. Otherwise, indeed, he will be called upon to avoid the effect of evidence of facts with which he denies all connection. It may be noted, moreover, that the instant case comes up from the same Circuit Court of Appeals which ruled on the *Bonanzi* case. Yet the court below, in spite of the *Bonanzi* decision, raises, but does not decide, the question as to the burden of proof (R. 361).

D. IT WAS CONCLUSIVELY SHOWN THAT THE GOVERNMENT'S CASE WAS NOT DERIVED FROM WIRE TAPPING

It is obvious that the only person qualified to testify as to the extent to which wire tapping was used as a source of evidence was William E. Durigan,

who supervised the Government's investigation (R. 290). And it is of some significance that defense counsel failed to put him on the stand when they inaugurated the inquiry into the sources of the evidence. Dunigan's testimony, when the Government put him on the stand, left no room for doubt not only that the Government's case was not derived exclusively from wire tapping, but that no material portion of the case stemmed from this source. The tapping of telephones took place over a period extending approximately from December 20, 1935, to March 20, 1936 (R. 266, 290-293). Dunigan stated that he knew of LeVeque, Nardone, Hoffman, Geiger, Saunders, and Erickson prior to December 20, 1935, from informers (R. 292, 294, 298). Kleb was known to him as a result of the "Monololo" incident (R. 293). The existence of Velez, perhaps the most important single witness for the Government (R. 177-230), was learned after March 20, 1936 (R. 293). The seizure of the "Pronto" on January 20, 1936, did not result from wire tapping (R. 293). Gottfried's name appeared first in an intercepted message, but his connection with the case was established only as a result of information furnished by Velez (R. 295-296). Geiger's name was mentioned in intercepted telephone messages, but there was no "inkling or intimation" of his capacity as radio operator. This was an inference which the investigators drew from the messages plus other information (R. 297). Wire tapping was "only incidental" in the investigation (R. 293). Only three of the 45 to 55 agents working on the case intercepted telephone communications

(R. 293). The Government would never have made a seizure in the case upon the basis of the telephone calls alone (R. 295).

It is clear that no inquiry which defendants might have made could have revealed more as to the use made of the intercepted telephone communications than was revealed by Dunigan. And his testimony shows that no part of the Government case was derived exclusively from wire tapping. Clearly the fact that a tainted source is available along with an innocent source cannot bar the use of the innocent source of evidence, under the principle laid down by Mr. Justice Holmes in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392. See also *United States v. Reed*, 96 F. (2d) 785 (C. C. A. 2d), certiorari denied, 305 U. S. 612.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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NOVEMBER 1939.



# SUPREME COURT OF THE UNITED STATES.

No. 240.—OCTOBER TERM, 1939.

Frank Carmine Nardone, Nathan W.  
Hoffman and Robert Gottfried, Peti-  
tioners,

vs.

United States of America.

On Writ of Certiorari to  
the Circuit Court of Ap-  
peals for the Second Cir-  
cuit.

[December 11, 1939.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

We are called upon for the second time to review affirmance by the Circuit Court of Appeals for the Second Circuit of petitioners' convictions under an indictment for frauds on the revenue. In *Nardone v. United States*, 302 U. S. 379, this Court reversed the convictions on the first trial because they were procured by evidence secured in violation of § 605 of the Communications Act of 1934 (c. 652, 48 Stat. 1064, 1103; 47 U. S. C., § 605). For details of the facts reference is made to that case. Suffice it here to say that this evidence consisted of intercepted telephone messages, constituting "a vital part of the prosecution's proof".

Conviction followed a new trial, and "the main question" on the appeal below is the only question open here—namely, "whether the [trial] judge improperly refused to allow the accused to examine the prosecution as to the uses to which it had put the information" which *Nardone v. United States*, *supra*, found to have vitiated the original conviction. Though candidly doubtful of the result it reached, the Circuit Court of Appeals limited the scope of § 605 to the precise circumstances before this Court in the first *Nardone* case, and ruled that "Congress had not also made incompetent testimony which had become accessible by the use of unlawful 'taps', for to divulge that information was not to divulge an intercepted telephone talk." 106 F. (2d) 41.

The issue thus tendered by the Circuit Court of Appeals is the broad one, whether or no § 605 merely interdicts the introduction into evidence in a federal trial of intercepted telephone conversa-

tions, leaving the prosecution free to make every other use of the proscribed evidence. Plainly, this presents a far-reaching problem in the administration of federal criminal justice, and we therefore brought the case here for disposition. 308 U. S. —

Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land. In a problem such as that before us now, two opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and laws but capable of infringement either through zeal or design. In accommodating both these concerns, meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated.

We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of § 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of § 605 would largely stultify the policy which compelled our decision in *Nardone v. United States*, *supra*. That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations, of morality and public wellbeing. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because "inconsistent with ethical standards and destructive of personal liberty." 302 U. S. 379, 384. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed "inconsistent with ethical standards and destructive of personal liberty." What was said in a different context in *Silverthorne, Lumber Co. v. United States*, 251 U. S. 385, 392, is pertinent here: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all." See *Gouled v. United States*, 255 U. S. 298, 307. A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose.

Here, as in the *Silverthorne* case, the facts improperly obtained do not "become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it" simply because it is used derivatively. 251 U. S. 385, 382.

In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intentment of § 605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention. Like mischief would result were tenuous claims sufficient to justify the trial court's indulgence of inquiry into the legitimacy of evidence in the Government's possession. So to read a Congressional prohibition against the availability of certain evidence would be to subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of the law by the law's officers. Therefore claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury. And if such a claim is made after the

trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim. The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

We have dealt with this case on the basic issue tendered by the Circuit Court of Appeals and have not indulged in a finicking appraisal of the record, either as to the issue of the time limit of the proposed inquiry into the use to which the Government had put its illicit practices, or as to the existence of independent sources for the Government's proof. Since the Circuit Court of Appeals did not question its timeliness, we shall not. And the hostility of the trial court to the whole scope of the inquiry reflected his own accord with the rule of law by which the Circuit Court of Appeals sustained him, and which we find erroneous.

The judgment must be reversed and remanded to the District Court for further proceedings in conformity with this opinion.

*Reversed.*

Mr. Justice McREYNOLDS is of opinion that the Circuit Court of Appeals reached the proper conclusion upon reasons there adequately stated and its judgment should be affirmed.

Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

